STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

☐ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse Accident	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Virdia Spain,

Petitioner,

14IWCC0361

vs.

NO: 09 WC 25332

Elgin Mental Health Center,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, TTD, medical expenses, notice and penalties and fees and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below.

On April 17, 2013, the Arbitrator caused an arbitration decision to be filed with the Commission, one in which the Arbitrator awarded benefits under the Act after finding that Petitioner sustained a compensable accident on June 20, 2008, that arose out of and in the course of her employment as Security Therapy Aide for Respondent. The compensable accident was found to be post traumatic stress disorder brought about as the result of Petitioner having a patient die in her arms. Respondent took timely appeal of the arbitration decision, conferring upon the Commission jurisdiction to review the arbitration decision. In doing so, the Commission arrives at a conclusion opposite of that of the arbitrator and finds Petitioner failed to prove she sustained a compensable accident relatable to the incident of June 20, 2008.

The Commission does not dispute Petitioner was present at the death of the patient as she testified to but finds no contemporaneous records, either employment or medical, that corroborates her witnessing the death of the patient resulted in manifestation of symptoms of post traumatic stress disorder. Most notably, Petitioner was seen by her primary care physician, Dr. Florentino, on June 26, 2008, six days after the death of the patient, and was diagnosed with

acute conjunctivitis. Though Petitioner testified that she informed Dr. Florentino of what she experienced on June 20, 2008, during that visit, nowhere was this account recorded. Dr. Florentino's record of Petitioner's June 26, 2008, is silent with respect to Petitioner having a patient die in her arm. At a later date, Petitioner requested of Dr. Florentino that he amend his June 26, 2008, note to reflect that she was seen because she suffered a trauma, but that request was denied with Dr. Florentino reiterating that she was seen on June 26, 2008, for what was diagnosed as acute conjunctivitis.

The Commission notes, in a letter dated January 23, 2009, Petitioner was denied a credit disability insurance by CUMA Mutual Insurance as the effective date of her policy came within six months of her having received medical advice, a diagnosis or treatment. The letter stated Petitioner's insurance policy became effective on July 30, 2008, but also both that she had received medical advice, a diagnosis or treatment relating to a disabling condition on February 15, 2008, and that the medical indication indicated that the disability began on October 31, 2008. The letter did not make any reference to any event occurring on June 20, 2008, for which Petitioner might have sought medical treatment for. The finding of October 31, 2008, as the onset date of Petitioner's disability, the Commission finds, to be significant as that was the day after Petitioner, herself, claimed was the day her disability began in the July 9, 2009, notice of injury she provided to Respondent.

Petitioner presented to Respondent on July 9, 2009, a notice of injury, one in which she documented her condition as post traumatic stress disorder and its onset date being October 30, 2008. According to Petitioner's claim in the notice of injury, she attributed her condition to being accused of negligent and reckless homicide of a patient, not for witnessing the death of a patient on June 20, 2008. The Commission finds, on October 30, 2008, Petitioner took part in a meeting that included her supervisor, a union representative and the nurse director and, at that meeting, Petitioner was informed that she was being placed on diverted duty while the death of patient was being investigated. It was also at that meeting that Petitioner began to experience chest pains and was subsequently hospitalized at Swedish Memorial Hospital.

In reviewing Petitioner's psychological treatment records, the Commission finds Petitioner, upon a referral from Dr. Floretino, was seen by Dr. Michael Shapiro, a psychiatrist, beginning in January 2009. Dr. Shapiro's notes from that first visit indicate Petitioner suffered her first panic attack on October 30, 2008, the date of the meeting in which she was placed on diverted duty. He also noted a second panic attack occurred the next day, on October 31, 2008, when the police came to her residence. On April 24, 2009, Dr. Shapiro wrote of Petitioner experiencing nightmares about going to jail. On June 16, 2009, Dr. Shapiro recorded that the anniversary of the death of the patient was June 20, 2009, but nothing more. This appears to have been Petitioner's first reference to the events of that day during her treatment with Dr. Shapiro. This occurred on or about Petitioner's seventeenth session with Dr. Shapiro. No record was made on June 16, 2009, of how the events of June 20, 2008, affected Petitioner's psyche.

At the time Petitioner treated with Dr. Shapiro, she was also seen, pursuant to Section 16 of the Act, by Dr. Gerald Hoffman. Dr. Hoffman's records indicate Petitioner complained of being unjustly accused for the death of her charge and recounted recurring dreams she had of being placed in a jail cell and of having the cell door slammed shut. Dr. Hoffman's records, as

14IWCC0361

with those of Dr. Shapiro, did not reference any indication as to how the death of the patient on June 20, 2008, itself, negatively impacted Petitioner.

The Commission finds it was not until November 20, 2009, that Petitioner first related her post traumatic stress disorder to the June 20, 2008, incident. She did this during her first visit to Dr. Jack Rodriguez, the psychiatrist she treated with subsequent to Dr. Hoffman's retirement. Dr. Rodriguez recorded, and subsequently testified, that Petitioner complained that she began experiencing symptoms of post traumatic stress disorder after having the patient die in her arms and doing so with a contorted face. To the extent Dr. Rodriguez wrote, in his treatment notes, about the professional or legal implications of the patient's death, he only wrote, on November 20, 2009, that Petitioner was held responsible for that death. He was not told of or did not make a record of Petitioner having dreams of going to jail or of having a cell door slammed shut, dreams Petitioner had previously related to both Dr. Shapiro and Dr. Hoffman.

The Commission, as stated above, finds no evidence to support a finding that the events of June 20, 2008, resulted in Petitioner's post traumatic stress disorder. After June 20, 2008, Petitioner was seen by her primary care physician, Dr. Florentino, and two psychologists, Dr. Shapiro and Dr. Hoffman, respectively, and never confined to them any ill-effects to witnessing the patient's death, rather complained of symptoms only after administrative and criminal proceedings against her were commenced in October 2008 and of symptoms directly relatable to those proceedings. The Commission relies on these records rather than the history Petitioner espoused to Dr. Rodriguez and at her arbitration hearing, a history first expressed more than one year after the claimed onset date.

The Commission, finding no compensable accident occurred on June 20, 2008, reverses the arbitration decision of April 17, 2013, and denies any benefit under the Act to Petitioner.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitration Decision of April 17, 2013, is hereby reversed and compensation denied.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 16 2014
KWL/mav
O: 03/18/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAMES PARRA,

Petitioner,

14IWCC0362

vs.

NO: 12 WC 43353

ADMIRAL HEATING & VENTILATING,

Respondent.

DECISION AND OPINION ON REVIEW

Petitioner appeals the June 12, 2013 19(b) Decision of Arbitrator Williams finding that Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment with Respondent on November 14, 2012, and that Petitioner failed to provide timely notice of his claim of injury.

Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causal connection, medical expenses, temporary total disability benefits, prospective medical care, and penalties and fees, and being advised of the facts and law, reverses the Decision of the Arbitrator with regard to Petitioner's right elbow injuries sustained on November 14, 2012, but affirms the Arbitrator's finding as to accident and causal connection with regard to Petitioner's alleged low back injury for the reasons specified below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Findings of Fact and Conclusions of Law:

1) Petitioner's two claims, 12 WC 43353 and 13 WC 609, were consolidated for hearing. On June 12, 2013, the Arbitrator found Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment on August 17, 2011, the subject of 13 WC 609. The Commission, in a decision to be issued simultaneous with the decision herein, affirms and adopts the Arbitrator's June 12, 2013 decision in 13 WC 609.

2) Petitioner testified he began working as a sheet metal worker for Respondent in 2003, performing installation of heating and A/C equipment. Petitioner testified that on August 17, 2011, while at a job site at a grade school, he sustained a right elbow and low back injury when he threw a 50 pound extension cord up to his foreman, Paul Tobin, who was up in the ceiling. [13 WC 609]. Petitioner testified he felt a pulling or burning in his right arm and elbow and a twisting injury in his lower back. Petitioner testified that prior to August 17, 2011 he had no right arm or low back treatment or injury. Petitioner testified that following his injury on that date he drove directly to Respondent's shop in Hillside and reported his injury to Mike Crnkovich, the general superintendent. Petitioner testified he returned to work for Respondent thereafter and continued working full duty for Respondent throughout the course of 2011, and into 2012. (T13-22).

3) Petitioner's immediate supervisor, Paul Tobin, testified Petitioner was not working with him on August 17, 2011, that Petitioner was actually kicked off the grade school jobsite due to Petitioner's behavior on August 3, 2011. Tobin testified Petitioner never advised him that he had injured himself at work on August 3, and that Petitioner did not return to the jobsite after being kicked off of it on August 3, 2011. (T73-75). Mike Crnkovich, testified Petitioner never reported an August 17, 2011 work-related injury to him on that date or any other date thereafter. Crnkovich testified that in August of 2011 he had a conversation with Petitioner after he was kicked off the grade school jobsite, and that during that conversation Petitioner made no mention of any work-related injury, but instead complained about working conditions, and that Petitioner was then placed on a different job project thereafter, at the Dirksen Federal Building. (T88-92).

4) Petitioner admitted he sought no treatment for his alleged right elbow or low back injuries from August 17, 2011. (T45). Petitioner admitted he saw Dr. Riccardo, his personal physician at Westbrook Internal Medicine, for a comprehensive physical on January 30, 2012. At the time of the January 30, 2012 office visit Dr. Riccardo noted all of Petitioner's systems were negative, no joint pain or swelling, no sciatic symptoms, and no low back spinous process tenderness, normal examination of his extremities, and a normal neurological exam. Dr. Riccardo's assessment was anxiety and alopecia. The office note fails to contain any history of Petitioner's alleged August 17, 2011 work injury or of his alleged right elbow and low back injuries. (RX1).

5) Petitioner testified that on November 14, 2012 he was working on a project for Respondent at Capital One on Golf Road in Rolling Meadows, performing retrofit heating and A/C work, with a co-worker, Robert Muldoon. Petitioner testified that on that date he was moving pallets of material weighing 400 to 500 pounds with a pallet jack, and while attempting to maneuver the materials he felt a pain in his right elbow and lower back. [12 WC 43353]. Petitioner testified he continued working until his supervisor, Mike Chancellor, called his co-worker, Muldoon, on Muldoon's cell phone at 12:45pm. Petitioner testified he spoke to Chancellor on Muldoon's cell phone and advised Chancellor that he had re-aggravated his right elbow and low back while working. Petitioner testified Chancellor advised him to take a few days off and see how he felt afterward. (T23-29).

6) Petitioner testified that on Sunday, November 18, 2012 at approximately 8:00 p.m. he called Chancellor and advised him that his right arm and back were no better with time off work, and that he had wanted to see a doctor regarding same. Petitioner testified that at that point Chancellor advised him that he was laid off. (T30-31). Petitioner testified that he reported back to the Capital One job site on November 19, 2012, and waited there for eight hours until Crnkovich arrived at the job site and gave him his layoff check. (T30-33).

7) On November 21, 2012 Petitioner sought treatment with Dr. Hsu at Westbrook Internal Medicine, at which time he reported he reinjured his back and right elbow on November 14, 2012, and that he had sustained a prior low back and right arm injury in August of 2011 when he threw 100 feet of cable to someone above him. [Companion Case 13 WC 609]. At the time of the November 21, 2012 office visit Petitioner complained of low back pain and right arm pain. Petitioner further reported that he had been taking Aleve four times a day since his prior injury in August of 2011 without resolution of symptoms. Dr. Hsu diagnosed back pain and right elbow pain/strain, referred Petitioner to physical therapy, and advised Petitioner x-rays and an orthopedic referral would be made if he failed to improve. (PX1).

8) On November 29, 2012, Petitioner sought treatment with Dr. Freedberg at Suburban Orthopaedics, at which time Petitioner provided the he pulled his right arm and low back while moving material with a pallet jack. Dr. Freedberg's assessment was a lumbar sprain/strain with left SI joint dysfunction, grade 1 spondylolisthesis at L5-S1, and right elbow lateral epicondylitis with brachialradialis strain. Dr. Freedberg recommended physical therapy and MRI scans of the lumbosacral spine and right elbow, and authorized Petitioner off work. (PX2).

9) On December 3, 2012, Petitioner underwent an MRI study of the lumbar spine, significant for spondylolysis at L5 and right foraminal herniation and diffuse bulge at L2-3, and an MRI study of the right elbow, significant for a radial collateral ligament tear and partial-tear of the common extensor tendon. (PX3).

10) On December 10, 2012 Petitioner was seen in follow up with Dr. Freedberg, at which time he reported constant burning, numbness, and tingling in his elbow, as well as constant

backaches. Dr. Freedberg recommended Petitioner remain off work, continue physical therapy, and consider right elbow surgery. (PX2).

11) On January 9, 2013, Dr. Freedberg performed right elbow surgery, with right elbow debridement of the extensor carpi radialis brevis and decortication of the bone, repair of the extensor mechanism, and imbrication of the posterior anterior capsule and radial collateral ligament. Petitioner's post operative diagnosis was right elbow lateral epicondylitis with mild laxity of the posterolateral corner. (PX4).

12) Petitioner was seen in follow up on January 24, 2013, February 25, 2013, and on April 10, 2013, during which time Petitioner underwent a course of physical therapy, remained off work, and reported improvement in his right elbow symptoms but continuing symptoms in his low back. (PX2).

13) On April 10, 2013 Dr. Freedberg recommended Petitioner remain off work, continue physical therapy for Petitioner's low back and right elbow, and referred him to Dr. Novoseletsky for consultation and possible lumbar injections. (PX2). Petitioner testified he was seen by Dr. Novoseletsky on April 17, 2012, but that he had not undergone any low back injections to date. Petitioner testified he was last seen by Dr. Freedberg on May 8, 2013, that he is still undergoing physical therapy three times a week, and that his elbow is improving. Petitioner testified he has been authorized off work by Dr. Fredeberg since November 29, 2012 through the date of hearing. (T34-39).

Although the Arbitrator found, with regard to Petitioner's right elbow, that Petitioner had failed to meet his burden of proof concerning the issues of accident, notice, causal connection, and temporary total disability, the Commission finds otherwise. The Commission finds that on November 14, 2012 Petitioner sustained an accidental injury arising out of and in the course of his employment with regard to his right elbow, that his current right elbow condition is causally connected to said accident, that Petitioner provided timely notice as required under Section 6(c), and that Petitioner was temporarily totally disabled with regard to his right elbow condition from November 29, 2012 through the date of 19(b) hearing, May 17, 2013.

On January 30, 2012, Petitioner underwent a comprehensive physical with his personal physician, Dr. Riccardo. Petitioner's physical examination was essentially normal, and the assessment made by Dr. Riccardo was limited to anxiety and alopecia. The January 30, 2012 office note contains no complaint with regard to Petitioner's right elbow. The record further contains no evidence of any right elbow medical treatment or any surgery recommendation in the years preceding the date of injury. The Commission finds significant that Petitioner testified, unrebutted, that prior to his November 14, 2012 work injury he received no medical treatment with regard to his right elbow. The Commission is also persuaded by fact Petitioner, a 45 year-old on the date of injury, worked full duty as a sheet metal worker for Respondent from 2003 up

until time of his November 14, 2012 work injury, and that the record is void of any evidence of lost time due to any right elbow complaints.

The Commission also is cognizant that both Dr. Hsu and Dr. Freedberg's office notes indicate they were treating Petitioner for pain in his right elbow due to a work related injury. On November 29, 2012 Dr. Freedberg issued a work duty status form authorizing Petitioner off work due to a work related injury. The Commission also finds significant the December 3, 2012 right elbow MRI findings indicating significant findings of a radial collateral ligament tear and partial-tear of the common extensor tendon. The Commission notes Respondent tendered no medical opinion with regard to the issue of causal connection between Petitioner's current right elbow condition and his November 14, 2012 work-related injury.

For the reasons stated above, the Commission finds Petitioner sustained accidental injuries, with regard to his right elbow, arising out of and in the course of his employment on November 14, 2012, and that his current condition of ill-being is causally related to same.

With regard to the issue of notice, the Commission finds Petitioner provided timely notice of his November 14, 2012 right elbow injury based upon his credible testimony on the issue. Petitioner testified that during the course of Mike Chancellor's November 14, 2012 cell phone call to his co-worker, Muldoon, he participated in the phone call and specifically advised Chancellor that he re-aggravated his right elbow during the course of the day. Petitioner testified Chancellor advised him to take a few days off, after which Petitioner contacted Chancellor on Sunday, November 18, 2012 and advised that his right elbow had not improved and he needed to seek medical treatment for same.

Based upon the finding of causal connection with regard to Petitioner's right elbow condition herein, the supporting medical records, and the off work authorizations, the Commission finds Petitioner was temporarily totally disabled for a period of 24-1/7 weeks, from November 29, 2012 through the date of 19(b) hearing, May 17, 2013, at $1,084.93 per week under Section 8(b).

The Commission affirms and adopts the Arbitrator's finding that Petitioner failed to prove his low back condition of ill-being is causally related to his November 14, 2012 work-related injury. The Commission finds significant Petitioner's testimony that he advised Dr. Freedberg at the time of his initial office visit on November 29, 2012 that he had been having low back pain for well over a year. Petitioner also provided a medical history to Dr. Hsu that in the year prior to November 14, 2012 he suffered from low back complaints requiring him to take four Aleve each day, without resolution of his symptoms.

With regard to Petitioner's request for a prospective medical award for his low back condition, based upon the Commission's finding of no causal connection with respect to same, the issue is moot.

With regard to the issue of penalties and fees based upon non-payment of temporary total disability benefits, the Commissions declines to award same, and finds a real controversy exists as to whether or not Petitioner's current condition of ill- being is causally related to his work accident. The Commission further finds Respondent behavior was not unreasonable nor did Respondent's action result in vexatious delay or intentional underpayment of benefits.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 13, 2013 is hereby reversed with regard to Petitioner's right elbow condition of ill-being, for the reasons stated herein, and affirmed and adopted with regard to Petitioner's low back condition of ill-being.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $1,084.93 per week for a period of 24-1/7 weeks, from November 29, 2012 through May 17, 2013, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $26,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 16 2014
KWL/kmt
O-02/11/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

14IWCC0362

PARRA, JAMES
Employee/Petitioner

Case# **12WC043353**

13WC000609

ADMIRAL HEATING & VENTILATING
Employer/Respondent

On 6/12/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0700 GREGORIO & ASSOC
SEAN C STEC
TWO N LASALLE ST SUITE 1650
CHICAGO, IL 60602

5104 WARMOUTH LAW PC
WILLIAM T WARMOUTH
17 N WABASH AVE SUITE 650
CHICAGO, IL 60602

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g)
☐ Second Injury Fund (§8(e)18)
☒ None of the above

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

19(b) ARBITRATION DECISION

14IWCC0362

JAMES PARRA
Employee/Petitioner

Case #12 WC 43353
#13 WC 609

v.

ADMIRAL HEATING & VENTILATING
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on May 17, 2013. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

A. ☐ Was the respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. ☐ Was there an employee-employer relationship?

C. ☒ Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?

D. ☐ What was the date of the accident?

E. ☒ Was timely notice of the accident given to the respondent?

F. ☒ Is the petitioner's present condition of ill-being causally related to the injury?

G. ☐ What were the petitioner's earnings?

H. ☐ What was the petitioner's age at the time of the accident?

I. ☐ What was the petitioner's marital status at the time of the accident?

J. ☒ Were the medical services that were provided to petitioner reasonable and necessary?

K. ☒ What temporary benefits are due: ☐ TPD ☐ Maintenance ☒ TTD?

L. ☐ Should penalties or fees be imposed upon the respondent?

M. ☐ Is the respondent due any credit?

N. ☐ Prospective medical care?

FINDINGS

- Claim #13 WC 609 is for an August 17, 2011, accident date and claim #12 WC 43353 is for a November 14, 2012 accident date.
- On August 17, 2011, and November 14, 2012, the respondent was operating under and subject to the provisions of the Act.
- On those dates, an employee-employer relationship existed between the petitioner and respondent.
- In the year preceding the injuries, the petitioner earned $84,364.80 and $84,624.80; the average weekly wages were $1,622.40 and $1,627.40.
- At the time of injuries, the petitioner was 44 and 45 years of age, *married* with no children under 18.

ORDER:

- The petitioner's claim for compensation benefits for injuries on August 17, 2011, and November 12, 2012, is denied and the claims are dismissed.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Robert Williams

6/12/13
Date

JUN 12 2013

FINDINGS OF FACTS:

Claim #13 WC 609 is for an August 17, 2011, accident date. In August 2011, the petitioner, a sheet metal worker, was retrofitting ducts on a heating and cooling system at Sutherland School under the supervision of project foreman, Paul Tobin. On August 3, 2011, Mr. Tobin told the petitioner to leave the job site after some comments were made to him by the petitioner. The petitioner never returned to the Sutherland School project after August 3, 2011. Contrary to the petitioner's testimony, Mr. Tobin's report for August 3rd does not include any statement of a report of an injury by the petitioner, an injury to himself or the throwing of an electric cord. Both Paul Tobin and General Superintendant, Mike Crnkovich, denied that the petitioner reported sustaining a work injury at Sutherland School in August 2011. The petitioner's first medical care after August 2011 was with his primary care doctor, Dr. Nick Riccardo of Westbrook Internal Medicine, on January 30, 2012. He did not report an August 2011 work injury or any work injury and did not complain of right arm, right elbow or lower back symptoms. He continued performing his regular work duties in a full capacity after August 2011.

Claim #12 WC 43353 is for a November 14, 2012, accident date. The respondent laid the petitioner off on November 19, 2012. The petitioner saw Dr. Norris Hsu of Westbrook Internal Medicine on November 21, 2012, and reported a re-injury to his lower back and right arm on November 14, 2012. The doctor noted lumbosacral tenderness, left paraspinal muscles tenderness and spasms, a negative straight leg raise, tenderness over his right lateral epicondyle and forearm muscles, mild tenderness over the lateral upper arm and pain with extension of his right wrist and supination. On November 29, 2012, the petitioner saw Dr. Howard Freedburg at Suburban Orthopaedics

for back and right arm pain and reported work injuries. Dr. Freedburg noted positive tenderness of the petitioner's left SI joint and tenderness in his right elbow. The doctor's diagnosis was a lumbar strain/sprain with left SI joint dysfunction, grade I spondylolisthesis L5-S1 and right elbow lateral epicondylitis with brachialradialis strain. He started the petitioner on medication and therapy. MRIs on December 3, 2012, revealed L5 spondylolsis with grade I spondylolisthesis narrowing of the foramina and a right foraminal herniation and a diffuse disc bulge at L2-L3 of his lumbar spine, and a radial collateral ligament tear and a partial tear of the common extensor tendon of his right arm. On January 9, 2013, Dr. Freedburg performed a debridement of the extensor carpi radialis brevis with decortication of the bone, repair of the extensor mechanism, and imbrications of the posterior anterior capsule and radial collateral ligament at Accredited Ambulatory Care, L.L.C.

On January 24, 2013, the petitioner was started on physical therapy at Suburban Orthopaedics. On April 10, 2013, the petitioner reported to Dr. Freedburg that his elbow was ok but had increased symptoms with his back. Dr. Freeburg recommended lumbar spine injections with Dr. Novoseletsky.

FINDING REGARDING THE DATE OF ACCIDENT AND WHETHER THE PETITIONER'S ACCIDENT AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT WITH THE RESPONDENT:

Based upon the testimony and the evidence submitted, the petitioner failed to prove that he sustained an accident on August 17, 2011, arising out of and in the course of his employment with the respondent. Based on the report of Mr. Tobin, his confrontation with the petitioner occurred on August 3rd and not the 17th and was due to the petitioner's behavior and not an injury. Mr. Crnkovich refuted the petitioner's

testimony that he was given notice of a work injury on August 17, 2011. Moreover, the petitioner did not work at the Sutherland School after being required to leave by Mr. Tobin on August 3, 2011. The petitioner is not credible. The petitioner failed to establish that he injured himself throwing an electric cord to Mr. Tobin on August 17, 2011.

The petitioner failed to prove that he sustained an accident on November 14, 2012, arising out of and in the course of his employment with the respondent. Again, Mike Chancellor refuted the petitioner's testimony that he reported a work injury on November 14, 2012, as was told to take the next day off, instead testified that he told his entire crew to take off due to no work. The petitioner's claim for compensation and benefits for injuries on August 17, 2011, and November 12, 2012, is denied.

FINDINGS REGARDING WHETHER TIMELY NOTICE WAS GIVEN TO THE RESPONDENT:

The respondent did not receive timely notice of the petitioner's claim of an August 17, 2011, accident. Paul Tobin denied that the petitioner reported or complained of a work injury in August 2011. The petitioner's claim for benefits for an injury on August 17, 2011, is denied.

The respondent did not receive timely notice of the petitioner's claim for a November 14, 2012, accident. Both Mr. Crnkovich and Mr. Chancellor refuted the petitioner's testimony of a report or complaint of a work injury on November 14, 2012. Nor was the filing of the petitioner's Application for Adjustment of Claim #12 WC 43353 on December 18, 2012, timely notice to the respondent since the initial date of accident claimed was August 24, 2012, and the Amended Application for Adjustment of Claim for an accident date on November 14, 2012, wasn't filed until January 8, 2013,

more 45 days later than the claimed accident date. The petitioner's claim for benefits for an injury on November 14, 2012, is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Houston Anglin,

Petitioner,

14IWCC0363

vs.

NO: 11 WC 41290

AT & T,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, 8j credit and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 4, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

14IWCC0363

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 16 2014
KWL/vf
O-3/18/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

14IWCC0363

ANGLIN, HOUSTON
Employee/Petitioner

Case# **11WC041290**

AT&T
Employer/Respondent

On 9/4/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1747 STEVEN J SEIDMAN LAW OFFICES
RYAN A MARGULIS
20 S CLARK ST SUITE 700
CHICAGO, IL 60603

0766 HENNESSY & ROACH PC
THOMAS C FLAHERTY
140 S DEARBORN SUITE 700
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC0363

Houston Anglin
Employee/Petitioner

v.

AT&T
Employer/Respondent

Case # 11 WC 041290

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Deborah Simpson**, Arbitrator of the Commission, in the city of **Chicago**, on **August 7, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other

FINDINGS

On the date of accident, **3/23/2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$69,394.00**; the average weekly wage was **$1,334.50**.

On the date of accident, Petitioner was **32** years of age, ***single*** with **2** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$23,984.58** for other benefits, for a total credit of **$23,984.58**.

Respondent is entitled to a credit of $**See Stipulation Below** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $889.67/week for 48 weeks, commencing 3/28/11 – 7/21/11, 12/22/11 – 4/16/12 and 4/27/12 – 8/07/12.

Respondent shall pay the Petitioner the temporary total disability benefits that have accrued to date, and shall pay the remainder of the award, if any, in weekly payments.

The Arbitrator finds the treatment to date reasonable and necessary. By stipulation, the only objection to the bills was as it related to liability. Accordingly, Respondent shall satisfy the following medical bills pursuant to Section 8(a) of the Act directly with the medical providers and shall receive a Section 8(j) credit for those portions of the bills that are satisfied by the group health carrier: Lifestyle Chiropractic ($5,435.00); Illinois Spine & Scoliosis Center ($500.0); Athletico ($6,047.00); Preferred Open MRI ($3,800.00); Pain Treatment Centers of Illinois ($15,568.00); Pain Treatment Surgical Suites ($16,657.60).

Pursuant to Section 8(a), Respondent shall further authorize and satisfy the medical expenses related to the diagnostic medial branch block at L5 & S1 as prescribed by Dr. Abusharif as such services are reasonable, necessary and causally related to the subject accident.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Richard L. Simpson
Signature of Arbitrator

Sept 4, 2013
Date

ICArbDec19(b)

SEP 4 - 2013

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Houston Anglin,

Petitioner,

vs.

A T & T,

Respondent.

14IWCC0363

No. 11 WC 41290

formerly consolidated with: 10 WC 39457 and 10 WC 39600

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The parties agree that on March 23, 2011 the petitioner and the respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer. The parties stipulate that the Respondent will satisfy bills listed in paragraph 7 directly with providers pursuant to fee schedule if found liable. They stipulate further that no specific dollar award is requested for the bills and that Respondent shall be given credit pursuant to section 8(j) for those bills satisfied by the group carrier.

At issue in this hearing is as follows: (1) did the petitioner sustain accidental injuries on March 23, 2011 that arose out of and in the course of his employment with the respondent; (2) is the petitioner's current condition of ill-being causally connected to the injury (3) is the respondent liable for the unpaid medical bills to Lifestyle Chiropractic in the amount of $5,435, the Illinois Spine and Scoliosis Center in the amount of $500.00, Athletico in the amount of $6,047.00, Preferred Open MRI in the amount of $3,800.00, Pain Treatment Centers of Illinois in the amount of $15,568.00 and Pain Treatment Surgical Suites in the amount of $16,657.60; (4) did the petitioner gave the respondent notice of the accident which is the subject matter of this hearing within the time limits stated in the Act; (5) is the petitioner entitled to TTD from 3/28/11-7/21/11, 12/22/11-4/16/12 and 4/27/12-8/07/12 representing 48 weeks; and (6) is respondent entitled to credit in the amount of $55,328.73 in nonoccupational indemnity disability benefits or should the credit under section 8(j) be in the amount of $23,984.58?

This case was consolidated with two previously pending worker's compensation claims case numbers 10 WC 39457 and 10 WC 39600. Prior to the hearing the parties moved in writing and orally to sever this case from the other two on the grounds that the petition seeking medical and temporary total disability compensation relates to the last case filed which is case number 11 WC 41290. The motion was allowed and the parties proceeded to hearing on the 19 (b) motion filed in case number 11 WC 41290.

STATEMENT OF FACTS

The Petitioner, Houston Anglin, testified that he was first employed by the Respondent, AT&T, beginning in November of 2000, and had been in its employ consistently through the date of the hearing. The Petitioner is employed as a cable splicer/technician which was described as medium to heavy work involving splicing cables above and below ground, connecting cables to the central office and conducting repairs and installations for commercial and residential customers. His work entailed going in and out of manholes, bending/twisting and lifting between 10 and 100 pounds and climbing up and down ladders.

The Petitioner had previously injured his low back due to a workplace accident which occurred on June 23, 2009. That matter is still pending it is one of the cases that was severed from this case by agreement prior to the hearing beginning. The Petitioner testified that, prior to March 23, 2011, his back was doing fine. He had not had any other problems he was back to work full duty and had not required orthopedic or neurological care for a while. He would see his chiropractor every now and then, but was not under active care from an orthopedist or neurologist. Before the subject occurrence, the Petitioner's last appointment with his chiropractor, Dr. Robert Higginbottom, was on March 15, 2011 where it is noted that he had a "decrease in pain and stiffness" (P. Ex. 1).

On March 23, 2011, the Petitioner and his partner, Kenneth Elstner, were assigned to a job at Ashland Avenue near Chicago Avenue in Chicago, Illinois. Their work was described by the Petitioner as "BAU" or "business as usual", involving installation of a circuit box, working in and out of manhole covers and working with ladders. He said they were going back and forth between manholes on this date as they were looking for where the cable was because it was not where they were told that it was. The Petitioner testified that there was a lot of lifting that day of heavy manhole covers and ladders. As he was performing these work activities, he noticed his lower back burning with a tingling sensation developing in his left buttock and leg. On that day petitioner was working with his supervisor Yves Edmond. The Petitioner testified that he informed Mr. Edmond at the jobsite that his back was bothering him from work. The Petitioner testified that it was a "wait and see" type of injury, meaning that he informed his supervisor of the problem, but would wait and see whether it became significant or worsened and required medical attention.

The Petitioner went back to his chiropractor after work on March 23, 2011. Dr. Higginbottom's therapy notes identify "increasing low back pain" during that visit (P. Ex. 1). The Petitioner continued to work on March 24, 2011 and March 25, 2011, but that the pain continued to worsen. On March 25, 2011, the Petitioner found it physically difficult to perform his job activities. The Petitioner testified that he told Mr. Edmond that his back pain was worsening and he needed to see a doctor. Petitioner returned to Dr. Higginbottom on that date. Dr. Higginbottom noted that his low back pain was increasing and recommended the petitioner be restricted to light duty. (P. Ex. 1)

Yves Edmond testified that he worked for the respondent for twelve years and that he is a manager for U-Verse. In March of 2011 he was the splicing manager. The petitioner was a

member of his crew at that time and that he was the petitioner's direct supervisor. On March 23, 2011, the petitioner and his partner, Kenneth Elstner were working Chicago at a site near Ashland and Chicago Avenues. Mr. Edmond goes to all his sites each day to survey for safety and quality. Mr. Edmond said he was at the job site in his role of supervisor for about 15 minutes that day just before lunch. The work was underground at that site Mr. Elstner was in the hole working underground while the Petitioner was working above ground, handing him his tools, supplies, cables and endplates during the time that he was at the site. The hole where they were working was very small and only one person could fit down there to work. There were two other workers across the street splicing the cable into the X-box. I talked to everyone there, checked to see if the workplace was safe, if they had the cones out to control traffic.

There is a policy in place regarding injuries or accidents on the job. They must be reported immediately to the employee's supervisor, in the case of the petitioner that would be him. I need to be at the scene and to transport the injured worker to the clinic for treatment if they need it and it is not an emergency. Mr. Edmond confirmed that the Petitioner told him at the jobsite that he was hurting, but states that there was no mention that it was from work activity. It is up to the employee to decide if they can continue to work so Mr. Edmond asked petitioner if he could keep on working and petitioner said fine. He testified that he never asked the Petitioner whether it was work related. Mr. Edmond testified that he did not know what the "wait and see policy" was. At the end of the day, they came back to the garage, he saw the petitioner but the petitioner did not say anything about being hurt at that time, if he had Mr. Edmond would have written a report as he is required to do so.

The petitioner and Mr. Edmond had a conversation a few days later at Mr. Edmond's cubical at that time petitioner told him his back was hurting from a previous injury. Since there was no indication it was job related he did not make a report.

Kenneth J. Elstner testified that he is employed by AT & T and that he was so employed on March 23, 2011. On that date, he and other members of his crew were working at a site near Ashland and Chicago Avenues, the first alley south of the intersection, in Chicago. The petitioner was one of the members of the crew, they are both cable splicers. They were getting the area customers ready for U-verse. They were there quite a few days, although he does not recall how many days, the petitioner was there each day also. On March 23, 2011, he and the petitioner were doing the underground work. We worked out of one manhole that day it was very crowded only room for one. I took the cover off of the first manhole. I saw that we needed to be in the other manhole so I got permission then went down there it was also a one person space. Petitioner stayed on top and handed me my tools and the supplies he needed. Mr. Elstner admitted he had no idea what the petitioner was doing above ground when he was not handing him supplies. According to Mr. Elstner the petitioner never told him anything about his back hurting or getting hurt on that day. Mr. Elstner was not the petitioner's supervisor and petitioner was not required to report any injuries to Mr. Elstner. Mr. Elstner agreed that the wait and see policy described by the petitioner does exist.

Although he does not remember what day of the week it was or exactly how long they were at the site, Mr. Elstner is convinced he was the only one going in and out of the manholes that day, he is the one who lifted the cover off the manhole and that no report of injury was made

to him. He admitted that he did not want to be at the hearing testifying, that he had better things to do and was only there because of the subpoena. He also admitted that he does not like working with the petitioner because the petitioner is not motivated.

On March 25, 2011, the medical records reflect that Dr. Higginbottom ordered that the petitioner be restricted to light-duty work beginning on March 28, 2011 (P. Ex. 1). The Respondent was unable to accommodate the restrictions. The Petitioner had an MRI on May 4, 2011 which was interpreted as being relatively normal. (P. Ex. 2) Eventually, the Petitioner was referred to a spine specialist, Dr. Anthony Rinella. Dr. Rinalla first evaluated the Petitioner on May 19, 2011, noting that the petitioner's medical history included a 2009 incident involving the Petitioner's low back but that petitioner had returned to work without problems after that injury. Dr. Rinella's notes identify a March 23, 2011 incident wherein the Petitioner developed low back tenderness radiating into his right leg due to climbing ladders and splicing cables (P. Ex. 2). Dr. Rinella's diagnosis was a lumbar strain with possible radiculopathy. He took the petitioner off of work and prescribed physical therapy (P. Ex. 2).

During a follow-up office visit on June 24, 2011, Dr. Rinella noted that the Petitioner was having mild relief with chiropractic treatment, he prescribed further physical therapy and released the Petitioner to go back to work with a 10-pound lifting restriction (P. Ex 2). The Respondent was not able to accommodate that restriction until April 17, 2012 for a period of approximately 10 days. The Petitioner was off of work again starting on April 27, 2012, and continuing through the date of the hearing, August 7, 2012.

On October 6, 2011, Dr. Rinella referred the Petitioner to a pain management specialist, Dr. Faris Abusharif (P. Ex. 2). Dr. Rinella continued to evaluate the Petitioner as he was undergoing pain management with Dr. Abusharif and physical therapy. Dr. Rinella took the petitioner off work completely on February 17, 2012 (P. Ex. 2). Dr. Abusharif administered a series of three epidural injections, the first one on February 24, 2012; the second one on March 19, 2012 and the third on June 11, 2012 (P. Ex. 4). After the second injection because the petitioner had ongoing radicular symptoms, EMG and Nerve Conduction Velocity (NCV) studies were done on May 10, 2012, revealing objective evidence of left L5 and left S1 radiculopathy (P. Ex. 4).

In a report dated June 5, 2012, Dr. Rinella causally related the diagnosis and treatment that the petitioner was currently receiving to his complaint of injury on March 23, 2011 at his workplace. (P. Ex. 2). As of July 16, 2012, Dr. Abusharif had recommended a diagnostic medial branch block at L5 and S1. The request for authorization was denied.

At the hearing, the Petitioner testified that his low back was very painful and tender. His left leg continued to persist with tingling and numbness and he had pain in the buttocks. The Arbitrator observed the Petitioner's uncomfortable demeanor. He had to shift positions while sitting and standup on occasion during his testimony and the balance of the hearing.

The Respondent offered four reports prepared by Dr. Jesse Butler (R. Ex 1 – R. Ex 4). Dr. Butler evaluated the Petitioner on August 23, 2011 and April 19, 2012, and authored additional reports dated June 20, 2012 and July 12, 2012. Dr. Butler confirmed in his report that the Petitioner sustained a "work related strain" on March 23, 2011. He did not believe that the

petitioner needed additional care or treatment for this injury (R. Ex. 2). Dr. Butler suggested that the Petitioner needed a neurological evaluation. In his July 12, 2012 report, Dr. Butler pointed out that the records of the treating physicians are silent on a workplace exposure for March 23, 2012 (R. Ex. 4).

On the issue of credit toward the TTD period claimed, Respondent offered the testimony of Anne Coyle, a manager at Sedgwick, the Respondent's third-party administrator for disability claims. Ms. Coyle provided a description concerning the various credits, repayments and tax reimbursements that would be owed to the Petitioner. Ms. Coyle testified that she works on the Respondent's account. Her job duties entail assisting in the coordination of workers' compensation and disability benefits and Respondent's E-link. Ms. Coyle testified that E-link is the Respondent's payroll system.

Ms. Coyle testified that Petitioner is currently receiving short term disability benefits and that Respondent funds the disability plan. To qualify for the Respondent's short term disability, Ms. Coyle testified that the employee needed at least six months of service and to be off work. She testified that disability is paid out at a 100% of the employee's pay and then drops to half pay. If Mr. Anglin were to prove a compensable workers' compensation claim, he would then be entitled to Accident Disability (hereinafter "AD") which is a life time benefit and combined workers' compensation benefit. She testified that if he proves a compensable claim, his short disability ("SD") benefits would be converted over to AD benefits. During this process SD would be reimbursed for the full benefits it paid in connection with this claim.

For the time of period March 27, 2011 through July 22, 2011 Petitioner received gross SD benefits totaling $22,320.65. His net benefits for this period totaled $8,360.71. Ms. Coyle testified that the difference between the gross and net pay were the withholdings which included taxes, Medicare, and Social Security. Altogether, the gross payments made by the Respondent toward the Petitioner's short-term disability totaled $55,328.73 whereas the net amount received by the Petitioner totaled $23,984.58. According to Ms. Coyle the Petitioner would be reimbursed for these withholdings if the claim were converted to workers compensation. In connection with that, Respondent would generate a "Repayment of Prior Wages" letter. (R. Ex. 6.) Ms. Coyle testified to and the letter reflects that if there were Federal taxes withheld from the SD payments in prior years (such as in case) the employee would be entitled to a deduction on his personal income taxes in the current year. (R. Ex. 6) If the SD benefits are paid during the same calendar year during the re-classification, Petitioner would be reimbursed those monies that were withheld for Federal taxes. She also testified that the employee would receive back the monies withheld for Social Security and Medicare regardless of the calendar year in which they were paid.

Ms. Coyle stated that after the re-classification if the Petitioner was still short in terms of what he is owed in TTD, he would be made whole by workers' compensation. On cross examination, Ms. Coyle admitted that the reimbursement system she described was dictated by contract and subject to negotiations at the time of contract renewal. She testified she thought Petitioner's labor agreement was recently renewed.

CONCLUSIONS OF LAW

Did an accident occur that arose out of and in the course of Petitioner's employment?

The Petitioner testified to performing a variety of work activities on March 23, 2011, including splicing cables, lifting manhole covers and working with ladders. The Respondent offered the testimony of Kenneth Elstner who stated that he was the only one that lifted a manhole cover on March 23, 2011. The Arbitrator does not find Mr. Elstner's testimony on that issue credible. It is difficult to believe that Mr. Elstner can recall the details of one specific day on the job over the course of his career that spanned over 11 years with the Respondent even though he does not remember what day of the week it was, how many days they were on that specific job since it was multiple days or how long before and after that day they were there. When asked to testify as to where he was working one month prior to March 23, 2011, he could not answer. Additionally, Mr. Elstner, by his own admission, did not personally observe the Petitioner's work activities for most of the day on March 23, 2011 his knowledge of what the petitioner was doing while he was underground was limited to when petitioner was giving him the supplies and equipment he needed.

The Arbitrator finds the Petitioner's testimony credible. The treating records document a decrease in symptoms as of March 15, 2011, then demonstrate an increase in symptoms during the visit with Dr. Higginbottom after the March 23, 2011 work day supporting the petitioner's testimony. Dr. Rinella's first office visit of May 19, 2011 provides a detailed history of injury consistent with the Petitioner's testimony (P. Ex. 2). Additionally, the Respondent's own Section 12 examiner, in his April 19, 2012 report, acknowledges that the Petitioner was injured at work on March 23, 2011 (R. Ex 2).

Based on the foregoing, the Arbitrator finds that the Petitioner sustained accidental injuries on March 23, 2011 which arose out of and occurred in the course of his employment by the Respondent.

Was timely notice of the accident was given to the Respondent?

Section 6(c) of the Illinois Workers' Compensation Act states that notice of the accident shall be given to the employer as soon as practicable, but not later than 45 days after the accident. Section 6(c) (2) states that "[n]o defect or inaccuracy of such notice shall be a bar to the maintenance of proceedings on arbitration or otherwise by the employee unless the employer proves that he is unduly prejudiced in such proceedings by such defect or inaccuracy." *820 ILCS 305/6(c)* (West 2004)

The purpose of the notice provisions is to enable the employer to investigate promptly and to ascertain the facts of the alleged accident. *City of Rockford v. Industrial Commission*, 214 N.E.2d 763 (1966) The giving of notice under the Act is jurisdictional and a prerequisite of the right to maintain a proceeding under the Act. However, the legislature has

mandated a liberal construction on the issue of notice. *S&H Floor Covering v. The Workers Compensation Commission,* 870 N.E.2d 821 (2007)

The Petitioner testified that he informed his supervisor, Yves Edmond, on March 23, 2011 that his back was hurting from work. Mr. Edmond acknowledged that the Petitioner told him that his back was hurting on March 23, 2011, but denied that he was ever specifically told that it was work-related. He also said that he did not ask the petitioner if it was work related. The respondent did not offer any information or proof that they were prejudiced by what they believe was in adequate notice.

It is undisputed that on two occasions – March 23, 2011 and March 25, 2011 – the Petitioner told Yves Edmond that his back was hurting. Given that the Petitioner was at work and had worked, by Mr. Edmond's own account, for at least a half a day on March 23, 2011 when this complaint was voiced at the jobsite. Given the facts that Mr. Edmond is petitioner's supervisor and there is a policy that when injured you must inform your supervisor that you were hurt, it is reasonable to assume that his back was hurting from the work activity. Why mention to At most, the Respondent could allege defective notice, but it has failed to allege any prejudice from the alleged defective notice.

The Petitioner provided timely proper notice of the accident to the Respondent.

Is the Petitioner's condition of ill-being causally related to the March 23, 2011 accident?

The medical records of Dr. Higginbottom document an increase in low back symptoms following the petitioner's work on March 23, 2011.

Dr. Rinella opined that the Petitioner's ongoing low back and left lower extremity symptomology were causally related to the March 23, 2011 accident. The EMG/NCV studies ordered and conducted after the second injection failed to provide relief from the petitioner's symptoms are objective evidence that document left L5 and left S1 radiculopathy.

Dr. Butler authors a narrative report after his evaluation of the Petitioner on August 23, 2011. That report does not offer an opinion regarding causation of the petitioner's condition. After his evaluation on April 19, 2012, Dr. Butler refers to a work-related injury of March 23, 2011, a sprain that he believes needs no further treatment. In the June 20, 2012 addendum, Dr. Butler acknowledges the EMG/NCV studies which demonstrate L5-S1 radiculopathy, but fails to offer an opinion as to the cause of that objective finding.

For the foregoing reasons, the Arbitrator does not find the conclusions of Dr. Butler reliable. Relying on the pre-accident medical status of the Petitioner, the mechanism of injury, the opinions of Dr. Rinella and the consistent course of medical care with Dr. Higginbottom, Dr. Rinella and Dr. Abusharif the arbitrator concludes that the Petitioner's condition of ill-being as it relates to his low back and left leg are causally related to the March 23, 2011 accident.

Were the medical services that were provided to Petitioner reasonable and necessary?

The Arbitrator finds that the treatment to date rendered to alleviate the Petitioner's low back pain and left leg symptomology, consisting of the initial chiropractic care, orthopedic follow-up visits, a series of three injections, MRI evaluations and EMG/NCV studies, is reasonable and related to the March 23, 2011 accident. Based on the parties' stipulation with respect to bills, the Respondent is ordered to satisfy directly with the medical providers pursuant to the fee schedule the following medical bills from (1) Lifestyle Chiropractic;(2) Illinois Spine & Scoliosis Center; (3) Athletico; (4)Preferred Open MRI; (5) Pain Treatment Centers of Illinois; and (6) Pain Treatment Surgical Suites.

Is the petitioner entitled to prospective medical care and is the respondent responsible for payment for said care?

As of the date of the hearing, the Petitioner had been prescribed a diagnostic medical branch block at L5 & S1 by Dr. Abusharif. The Petitioner had shown improvement with the series of injections but not complete relief and still has significant pain, the Arbitrator finds this treatment recommendation reasonable. Only Dr. Butler offered an opinion refuting the need for further treatment. Based on the foregoing, the Respondent shall authorize and satisfy the medical expenses related to the diagnostic medical branch block at L5 & S1 as prescribed by Dr. Abusharif as such services are reasonable, necessary and causally related to the subject accident.

What temporary benefits are owed to the petitioner?

The evidence established that the Petitioner was either authorized off of work or prescribed work restrictions that the Respondent could not accommodate for three different time periods spanning 48 weeks: 3/28/11 – 7/21/11, 12/22/11 – 4/16/12 and 4/27/12 – 8/07/12. For the reasons stated above the arbitrator the arbitrator finds that the petitioner is entitled to TTD. Accordingly, the Respondent shall pay temporary total disability benefits that have accrued in the amount of $889.67 per week for this 48-week time period.

What is the amount of credit owed the Respondent?

Section 8 (j) of the Act states in relevant part that:

> "In the event the injured employee receives benefits, including medical, surgical or hospital benefits under any group plan covering non-occupational disabilities contributed to wholly or partially by the employer, which benefits should not have been payable if any rights of recovery exist under the Act, then *such amounts so paid to the employee* from any such group plan that shall be consistent with and limited to the provisions of paragraph 2 hereof, shall be credited to or against any compensation payment for incapacity for work or any medical, surgical, or hospital benefits made under this Act……"

An employer should not be entitled to a credit for amounts not paid to the employee, including amounts paid to the government and withheld in taxes. *Navistar Int'l Transp. Corp. v. Indus. Comm'n*, 315 Ill. App. 3d 1197, 1206, 734 N.E.2d 900, 907 (2000).

There is a disagreement between the parties as to the amount of credit the Respondent should be afforded against temporary total disability benefits owed based on the non-occupational disability benefits paid pursuant to Section 8(j) of the Act. The parties agree that the Respondent rendered gross payments of $55,328.72 whereas the Petitioner, after various deductions including taxes, only received a net amount of $23,984.58. At issue is which of these two figures represents the appropriate credit that the Respondent shall be afforded.

The Respondent offered the testimony of Anne Coyle who described the Respondent's benefit system and what would take place if the Arbitrator were to find that the Petitioner sustained a compensable workplace accident. All of these policies were dictated by contract, contracts which can be re-negotiated and changed, thus impacting the potential reimbursements owed to the Petitioner. It is not within the Arbitrator's legal authority to order such reimbursements or adjustments.

The Arbitrator is guided by the holding in *Navistar International Transportation Corporation v. The Industrial Commission*, 315 Ill. App. 3d 1197; 734 N.E.2d 900 (1st Dist. 2000). In that case, similar to this one, the Respondent argued that it was entitled to a credit for the gross amounts paid to the Petitioner before deductions whereas the Petitioner argued the credit should be for the net amounts actually received. Following the plain language of the Workers' Compensation Act, the Court held that the employer should not be entitled to a credit for amounts not actually received by the Petitioner. The credit was only afforded for the net amount received by the Petitioner.

The Respondent, through the testimony of Ms. Coyle, presented a complicated system of reimbursements and credits that were agreed to by the employees and the employer through contract negotiation. The Respondent rendered gross payment which, after deductions, yielded a net amount paid to the Petitioner of $23,984.58. The Commission does not have the legal authority to enforce various internal contract arrangements between the Respondent and its various contracted unions. In applying the *Navistar* case, the Arbitrator finds that the Respondent is entitled to a Section 8(j) credit for non-occupational disability benefits totaling $23,984.58.

ORDER OF THE ARBITRATOR

Respondent shall pay Petitioner temporary total disability benefits of $889.67/week for 48 weeks, commencing 3/28/11 – 7/21/11, 12/22/11 – 4/16/12 and 4/27/12 – 8/07/12.

Respondent shall pay the Petitioner the temporary total disability benefits that have accrued to date, and shall pay the remainder of the award, if any, in weekly payments.

The Arbitrator finds the treatment to date reasonable and necessary. By stipulation, the only objection to the bills was as it related to liability. Accordingly, Respondent shall satisfy the following medical bills pursuant to Section 8(a) of the Act directly with the medical providers

and shall receive a Section 8(j) credit for those portions of the bills that are satisfied by the group health carrier: Lifestyle Chiropractic ($5,435.00); Illinois Spine & Scoliosis Center ($500.0); Athletico ($6,047.00); Preferred Open MRI ($3,800.00); Pain Treatment Centers of Illinois ($15,568.00); Pain Treatment Surgical Suites ($16,657.60).

Pursuant to Section 8(a), Respondent shall further authorize and satisfy the medical expenses related to the diagnostic medial branch block at L5 & S1 as prescribed by Dr. Abusharif as such services are reasonable, necessary and causally related to the subject accident

Deborah L. Simpson
Signature of Arbitrator

Sept 4, 2012
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rodney Barger,
Petitioner,

vs. NO: 12 WC 25442

T. K. T., Inc.
Respondent.

14IWCC0364

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, permanent partial disability and prospective medical expenses and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof..

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 1, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 16 2014

Ruth W. White

Ruth W. White

Daniel R. Donohoo

Daniel R. Donohoo

o-03/26/14
rww/wj
46

DISSENTING OPINION

I must respectfully dissent as I would have reversed the decision of the Arbitrator and found that Petitioner was credible regarding sustaining an accidental injury to his low back that arose out of and in the course of his employment.

Petitioner testified that he had never driven that particular truck before and when he got into it he noticed that there was a 2x4 under the seat. (T.11-12). Petitioner testified that he did not put the board under the seat himself and has no idea who did. (T.31). He testified that it was very uncomfortable to sit on, there was a lot of bouncing, and his lower back started to hurt but he continued to drive his route. (T.13). Petitioner testified that there were no springs under the seat like a normal seat would have and "the board was right on my tailbone all day." (T.15). Petitioner testified that he could barely walk when he got out of the truck and it was very painful so he filled out an incident report and spoke with either Dave Janson or Shawn Kabat at Respondent on the same day that he took the photograph. (Id.). Petitioner testified that he took the photograph to gather evidence after he finished his route and his back was "sore and hurting." (T.28).

On cross-examination, when Petitioner was shown the May 24, 2012 incident report, he acknowledged that it was a long time ago and he didn't remember which truck numbers were which but that there were actually two incidents. (T.23). Petitioner testified that the first one involved a "rough ride" in Truck 72 on May 24, 2012, which is the subject of the incident report in evidence. Petitioner testified that the second incident was in Truck 84, which had the 2x4 under the seat, about a week later. (T.24). Petitioner testified that he "also wrote up an injury report just like that for that truck." (T.25). Petitioner testified that after the first incident, he was just sore and didn't need medical treatment but after the second one his symptoms increased a lot due to sitting on the 2x4 board. (Id.). Petitioner testified that he made a written report after both of the incidents and they were within a week of each other. (T.30). I would note that neither Dave Janson nor Shawn Kabat testified in this matter and there is no evidence to rebut Petitioner's testimony that there were two incident reports within a week of each other.

Petitioner also testified that when he first saw the board under the seat in Truck 84 he lifted it up and tried to pull it out but "it wouldn't go anywhere." Petitioner testified, "I'm guessing it was screwed down. I tried to move it and it wouldn't move." (T.26-27).

Respondent's witness, Alex Bartolomucci, testified that he looked at the truck "probably when we got the accident report." (T.51). However, it isn't clear to which accident report he is referring. Mr. Bartolomucci never testified that Petitioner only made one incident report.

Regarding how the board got there in the first place, Mr. Bartolomucci testified that "evidently somebody had lifted it up and stuck it in there" but he claimed that there was no permanent attachment of the board to the seat or the frame. (T.41) Mr. Bartolomucci testified that he did not know who put the board in the truck but denied that it was fair to say that it was done by an employee of Respondent because "our yard is open, it's not fenced, so anybody can – a passerby can access any of our trucks." (T.49). Mr. Bartolomucci testified that the seat cushion can be flipped up (T.41) but Petitioner testified that he was not aware that the seat flipped up. (T.56). Mr. Bartolomucci believed that it had not been permanently attached because there are currently no holes in either the cushion or the frame. (T.50). However, he never saw the board under the seat and doesn't know who took the board out. (Id.).

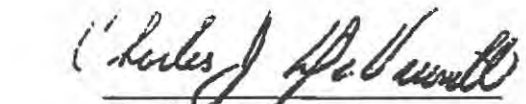
Despite Mr. Bartolomucci's testimony that there was no evidence that the board had been permanently affixed to the seat and the fact that Respondent introduced a service report that doesn't mention anything about a board being under the seat cushion of Truck 84 on May 29, 2012, it was nevertheless unrebutted that the seat in the truck that Petitioner was driving *was defective on the day he drove it.* Petitioner testified that a 2x4 board was under the seat that day, which he was unable to remove, and after driving all day on it he began to experience low back

pain. I find the testimony of Mr. Bartolomucci to be preposterous and incredible that, a 2x4 board under the truck seat would have "very little" effect and "wouldn't have affected the integrity of the air ride system" because it would "be like having a seat in a Cadillac or a car with like lumbar support where you can make adjustments." (T.40). Even though he believed that someone would most likely not even feel the board underneath the seat because of the padding, he also admitted that it would change the elevation of the rear portion of the cushion. (T.51). Furthermore, even though he never saw the board under the seat, he testified that if he had seen it he would have taken it out because it is not supposed to be there. (T.50).

Petitioner testified that the seat cushion was very thin and worn out and he could definitely feel the board as he sat in the seat and rode in the truck. (T.56-57). In response, Mr. Bartolomucci testified that the seat in that truck was no different from any other truck in the fleet but he did not actually testify as to the condition of the seat and the amount of padding it contained. (T.58). Since Mr. Bartolomucci never saw the board and never sat on the seat with the board under it, his opinion is speculative as to how much Petitioner would have felt while driving the truck.

Although the accident date and the truck number were unclear, Petitioner made a motion to conform the Application for Adjustment of Claim to the proofs, which was granted by the Arbitrator. I do not find that the confusion regarding the date of accident to be fatal to Petitioner's claim. Petitioner credibly testified that there were two incident reports within a week of each other and this was not rebutted by Mr. Bartolomucci. I don't find it significant that Respondent's Annual Service Report for Truck 84 does not mention a board under the seat. I would note that it is possible that the Technician, Mike Ring, could have removed it without noting it on the form and that Mr. Ring did not testify at the hearing.

Petitioner credibly testified that had he began to experience back problems while he was driving the truck with the defective seat and was bouncing with his tailbone directly over the 2x4. I would find Dr. Gornet's causal connection opinion to be credible and consistent with the mechanism of injury in this case. The medical evidence shows that Petitioner has a central disc herniation and annular tear at L5-S1. I would find that Petitioner has met his burden of proof regarding accident and would award prospective medical treatment including the CT discogram.



Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

BARGER, RODNEY
Employee/Petitioner

Case# **12WC025442**

T K T INC
Employer/Respondent

14IWCC0364

On 5/1/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2261 WILLIAMS CAPONI & FOLEY
KIRK A CAPONI
30 E MAIN ST PO BOX 565
BELLEVILLE, IL 62222

0734 HEYL ROYSTER VOELKER & ALLEN
JOE GUYETTE
102 E MAIN ST SUITE 300
URBANA, IL 61801

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

RODNEY BARGER
Employee/Petitioner

v.

T.K.T., INC.
Employer/Respondent

Case # 12 WC 25442

Consolidated cases:
14IWCC0364

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Gerald Granada, Arbitrator of the Commission, in the city of Collinsville, on March 26, 2013. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other *

FINDINGS

14IWCC0364

On the date of accident, May 24, 2012, Respondent was operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did not* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is not* causally related to the accident.

In the year preceding the injury, Petitioner earned $45,499.48; the average weekly wage was $847.99.

On the date of accident, Petitioner was 34 years of age, *married* with 3 children under 18.

Respondent *has* paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $8,749.95 for TTD, $693.29 for TPD, $00.00 for maintenance, and $00.00 for other benefits, for a total credit of $9,443.24.

Respondent is entitled to a credit for amounts paid toward the petitioner's medical treatment under Section 8(j) of the Act.

ORDER

The petitioner failed to establish that he sustained an accident that arose out of and in the course of his employment with respondent. No benefits are awarded.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

4/26/13
Date

MAY - 1 2013

Findings of Fact

Petitioner works as a truck driver for the Respondent. He is claiming a back injury stemming from an alleged accident on May 24, 2012. At around that time period, Petitioner was driving the "Paducah route" which covered up to 500 miles roundtrip over a period of 8 to 12 hours. During his route Petitioner would also make stops to drop off freight at various locations.

Petitioner testified that on May 24, 2012, he was scheduled to drive the Paducah route and noticed a 2 x 4 board under the seat cushion of the truck he would be driving that day. He took a photograph of the driver's seat with the board lodged under the seat cushion (see PX 6). He explained that he could not remove the board. According to Petitioner, there were no springs in the truck seat. He did not tell anyone about the board because he did not think it would make a difference. He testified that as he drove the truck with the board under the seat cushion, he began to feel uncomfortable and eventually experienced low back pain. Despite his back pain, he continued to drive, but had difficulty walking after exiting the truck. He later reported this incident to Dave Jansen.

On June 4, 2012, Petitioner sought chiropractic care at Trenton Chiropractic Clinic. (PX 2) The June 4, 2012 records from that medical provider indicate in the "Subjective" section, a history of the Petitioner complaining of back pain that "...started about 2 weeks ago (May 24, 2012) while driving a tractor trailer at work. It got much worse last week after driving a truck with a 2X4 plank under the seat." (PX 2) The chiropractor diagnosed the following conditions throughout the medical records: subluxation of the lumbar, sacrum, cervical and thoracic areas; lumbar sprain or strain; cervical strain; hip/thigh pain; and muscle spasm. His treatment from this provider included electric stimulation, heat application, myofascial release and manipulation. On July 13, 2012, an MRI was taken of Petitioner's cervical and lumbar spine. The MRI revealed mild disk osteophytes complex at C6-7, and degenerative disk disease with mild broad base diffuse disk protrusion at L5-S1.

Petitioner was subsequently referred by his chiropractor to Dr. Matthew Gornet, who first saw the Petition on September 17, 2012. Dr. Gornet testified that the Petitioner's initial complaints were low back pain going down his left side into his knee and neck pain into both shoulders, and headaches. Dr. Gornet noted in the MRI scans that the Petitioner had an annular tear and small protrusion at C6-7, and a central herniation and annular tear at L5-S1. Dr. Gornet administered injections and indicated that a spinal fusion would be part of the treatment plan. Dr. Gornet testified that assuming Petitioner's history was factually correct, he believed the Petitioner's conditions were causally connected to his employment.

On September 25, 2012, Petitioner underwent an IME with Dr. Kevin Rutz. Dr. Rutz noted the Petitioner provided a history of developing low back pain after driving approximately 500 miles in a semi-truck with a two by four placed under the seat cushion. He further noted Petitioner developed neck pain four or five days later. Dr. Rutz testified that he noted the Petitioner's findings from his MRI and his medical reports, and diagnosed Petitioner with neck and shoulder pain, and low back pain with some radicular features secondary to degenerative disc disease. He did not believe these conditions were work related because he did not see the mechanism of injury – i.e. riding in a vehicle with bad shock absorption - could account for the conditions seen on the MRI. Furthermore, he opined that the Petitioner's complaints of neck and shoulder pain 4 or 5 days following the alleged accident date do not support any causal connection.

Petitioner testified during cross examination that that he initially became sore after driving truck #72 on May 24, 2012. Approximately one week later, he drove truck #84, which had a 2x4 board beneath the back portion of the driver's seat. The petitioner testified that truck #72 had a rough ride, and caused some soreness in his low

back. That soreness resolved within a few days, and he explained that he did not have any low back symptoms when he began driving truck #84. While driving truck #84, he experienced a significant increase in his symptoms, and he attributed those symptoms to driving the truck with the board in the seat. Additionally, Petitioner testified that his May 24, 2012 "Personal Injury Report" mentions back and shoulder complaints and indicates the trucks are rough riding, but does not make any mention of having to sit on a seat having a board placed underneath. (See RX C) He further acknowledged that he had an accident while driving a truck for the Respondent in February 2012. Following that accident, he did not seek any medical treatment, and there was nothing physically that restricted him from being able to do his regular job. He admitted the accident of February 2012 was a "more jarring ride" than what he experienced while driving around with the board beneath his seat.

Alex Bartolomucci testified on behalf of the Respondent. He is the Respondent's Director of Operations. In his position, he oversees the Respondent's trucking terminals, including truck maintenance and repairs. He testified that the Petitioner had an accident in February, 2012 in which the Petitioner drove a truck into a median and hit a guard rail. This resulted in the truck being jack-knifed and totally damaged. Bartolomucci also described the seats of Respondent's trucks as having air ride seats, which means that there is an air cushion in the seat. He described the seat cushions as basically a large air bubble. The seats in the trucks can be lifted to adjust the air cushion. If there was a board underneath a seat cushion, this would only change the seat cushion angle. He denied seeing a board inserted underneath a seat cushion and that no board was found on any prior or subsequent inspection of the truck driven by Petitioner. Bartolomucci explained that if there was a board, it could be removed by simply lifting the seat cushion up or tilting the seat cushion forward.

Petitioner testified on rebuttal that he was not aware that the seat cushions could be lifted or flipped up and that he tried, but could not remove the board under his seat cushion.

Based on the foregoing, the Arbitrator makes the following conclusions:

1. Petitioner failed to prove he sustained an accident on May 24, 2012. This finding is based primarily on the lack of credibility in this claim. Initially, the Arbitrator notes the inconsistencies between the Petitioner's testimony and both his medical records as well as the evidence presented by the Respondent. Petitioner testified that he hurt his back while driving with a board placed under his seat on May 24, 2012. However, the initial medical records show that the Petitioner was complaining of pain on May 24, 2012, and subsequently drove a truck with a board underneath his seat some time after May 24, 2012. The May 24, 2012 accident report does not mention anything involving the Petitioner driving with a board under the driver seat. While the inconsistencies regarding the accident date are not by themselves fatal to the Petitioner's claim, there are other facts that further spread the cloud of doubt in this case. The Arbitrator finds some serious credibility questions raised by the fact that the Petitioner took the time to photograph the seat with a board placed underneath the seat cushion, but did not call anyone to try to either address the reason why the board was there or whether it needed to be removed. Petitioner's explanation that he did not report the board under the seat because it would not make any difference did not stop him from completing an accident report after the fact. The unrebutted testimony of Mr. Bartolomucci casts even further doubt on the credibility of this claim. The fact that the seat cushion, as described by Bartolomucci, is basically filled with air and can be easily lifted up or tilted forward, and that there was no board found under the seat cushion during the pre-accident or post-accident inspections – all further erode the credibility of Petitioner's testimony regarding the significance of the alleged board under his seat. Petitioner's claim that he was injured due to a defective seat was clearly rebutted by the testimony of Mr. Bartolomucci. And assuming arguendo that there was a board lodged under the seat cushion of Petitioner's truck, the evidence shows that the board could have easily been removed by simply lifting the seat cushion up –

a fact made evident since the alleged board was not found during the post-accident inspection. In sum, the Petitioner's claim cannot overcome the issue of credibility created by the conflicts between the Petitioner's testimony and the facts presented at trial.

2. Based on the Arbitrator's findings regarding the issue of accident, all other issues are rendered moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

FRANCISCO ADAN,

Petitioner,

vs. NO: 11 WC 05328

MULLINS FOOD PRODUCTS, INC.,

14IWCC0365

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses and temporary total disability benefits, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Arbitrator awarded Petitioner medical expenses of $103,898.32 per the medical fee schedule. We modify the Arbitrator's award and do not award Petitioner non emergency transportation charges from Marque Medicos. The Commission further modifies the Arbitrator's award to only authorize medical expenses that were certified per the utilization reviews from Dr. Adkins and Dr. Cox.

Petitioner should not be awarded medical expenses in the form of non emergency transportation charges from Marques Medicos. Petitioner received such transportation on

4/11/11, 4/6/11, 4/20/11, 5/18/11, 8/5/11, 8/15/11, 9/6/11, 10/17/11, 1/20/12, 5/11/12, 7/10/12 and 7/24/12. Those transportation charges total $5,837.00. Per the fee schedule those charges would then amount to $3,680.96, per Respondent. Though the Respondent has suggested that the amount due for such transportation services would be reduced pursuant to the fee schedule, the Commission finds said charges to be neither reasonable nor necessary. Petitioner was able to drive an automobile, and drove himself to many of his appointments and while running personal errands. In addition, his wife drove him to appointments.

The Commission believes that the provider, Marque Medicos, is aware of the requisites necessary to qualify said transportation charges for payment and has failed to provide the necessary justification for same.

Since the record is devoid of the elements necessary to justify the payment of the non-emergency charges, as listed above, the Commission denies same. Based upon the record and the findings of the Commission, the Petitioner is not liable for the payment of same.

Further Petitioner is only entitled to medical expenses as authorized in the utilization reviews from Dr. Adkins and Dr. Cox. We agree with Dr. Adkins' and Dr. Cox's findings and reasons and therefore do not authorize medical expenses for the treatment that was non-certified. Dr Adkins did not certify the medial branch blocks on 4/6/11 and 4/20/11. Dr. Cox only certified the first 10 physical therapy visits out of the 26 that Petitioner attended from 2/11/11 to 5/4/11 and continuing.

Dr. Adkins found the medial branch blocks were not medically necessary on May 24, 2011, because Petitioner had lumbar radiculopathy and a positive straight leg test. On June 16, 2011, Dr. Cox certified only the first 10 physical therapy visits based on the ODG-TWC Low Back Procedure Summary, which supports skilled physical therapy to address acute low back complaints for up to 10 visits over five weeks. Moreover, Dr. Cox wrote that there is no evidence of long term benefits from prior skilled physical therapy and it is unclear how providing the same treatment is expected to produce a different or better outcome. After the significant number of physical therapy visits Petitioner has attended, Dr. Cox wrote it is expected he would be able to independently complete a home exercise program. Therefore, we only award the medical expenses for the treatment that was certified in the utilization reviews.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision is modified as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $319.00 per week for a period of 84-1/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

14IWCC0365

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the reasonable and necessary medical expenses as authorized per the utilization reviews minus the charges for non emergency transportation under §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 16 2014
TJT: kg
O: 3/17/14
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

ADAN, FRANCISCO F
Employee/Petitioner

Case# **11WC005328**

MULLINS FOOD PRODUCTS INC
Employer/Respondent

14IWCC0365

On 3/5/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.12% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2553 McHARGUE, JAMES P LAW OFFICE
MATTHEW C JONES
100 W MONROE SUITE 1605
CHICAGO, IL 60603

2461 NYHAN BAMBRICK KINZIE & LOWRY PC
J G BAMBRICK JR
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Francisco F. Adan
Employee/Petitioner

v.

Mullins Food Products, Inc.
Employer/Respondent

Case # **11** WC **5328**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Milton Black**, Arbitrator of the Commission, in the city of **Chicago**, on **August 28, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **January 17, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned **$20,660.64**; the average weekly wage was **$397.32**.

On the date of accident, Petitioner was **27** years of age, ***married*** with **2** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$1,546.65** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$1,546.65**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$319.00**/week for **84 1/7th** weeks, commencing **January 18, 2011** through **August 28, 2012**, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of **$1,546.65** for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of **$15,877.60** to **Marque Medicos**, **$12,166.42** to **Medicos Pain and Surgical Specialists**, **$491.00** to **Prescription Partners**, **$56,651.61** to **Dr. Robert Erickson**, **$1,224.64** to **Elite Physical Therapy**, **$1,027.29** to **Naperville Medical**, **$14,850.40** to **Metro Anesthesia**, and **$1,609.36** to **Industrial Pharmacy Management**, as provided in Sections 8(a) and 8.2 of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Walter Black

Signature of Arbitrator

March 5, 2013

Date

ICArbDec19(b)

MAR 5 - 2013

FACTS

The Petitioner testified that on January 17, 2011 he injured his low back while working for the Respondent. January 17, 2011, was the Petitioner's first day of work as an employee of the Respondent. However he had been consistently working at Mullins for nearly a year, being dispatched there regularly and continuously by a staffing agency, until being hired directly by the Respondent. That day, the Petitioner was working in the weighing station, with his shift being 1:00 p.m. to 11:00 p.m. He was weighing products for the next day, consisting of moving heav barrels off of pallets by himself and then lifting and maneuvering them down to the floor where they could be weighed. The barrels weighed between 300 and 400 pounds.

At approximately 5:30 p.m., the Petitioner was breaking down a large wooden container in which tomato paste had been stored, at which time he attempted to lift one of the sides of the container, while unknowingly catching his foot on the bottom of the container such that when he forcefully lifted the piece upwards, the piece wa trapped beneath his foot causing resistance. The Petitioner testified that he immediately experienced intense low back pain. The Petitioner testified that he had not been experiencing any pain or difficulty with his low back that da prior to his lifting injury and had never suffered any prior accidents or injuries to his low back in the past.

Immediately after the accident, the Petitioner notified his supervisor, "Roberto" and was directed to the company clinic, Advanced Occupational Medicine Specialists, where he was seen by Dr. Gerald Cerniak. The medical records indicate that he was experiencing 10 out of 10 low back pain, with significantly limited lumbar range of motion. (Px. 1, p. 12) He was diagnosed with axial low back pain, low back strain, and paraspinal muscle spasm, noted to have been "all secondary to a lifting incident at work on January 17, 2011." (Id. At 13) He was giv a note to return to work with sedentary duty restrictions, and no lifting, bending, squatting, pushing, or pulling. (Id. The Petitioner presented this note the following day, but was not ever offered a modified position with the Respondent.

The Petitioner followed up with Dr. Khanna at Advanced Occupational Medical Specialists on January 25, 2011, with minimal improvement to his low back condition. He followed up again with Dr. Khanna on February 1, 2011, at which time he was found to have ongoing muscle spasms. (Px. 1, p. 10) An MRI was recommended, and the Petitioner was given work restrictions once again. On the way to the appointment with Dr. Khanna, the Petitioner's car broke down, causing him to push the vehicle off to the side of the road. The Petitioner's symptoms continued to be solely axial in nature with regard to his low back. (Id. At 15) He had some increased pain and tingling in his legs for about a week thereafter.

The Petitioner underwent the recommended MRI of his lumbar spine on February 7, 2011, at Athletic Imaging. The radiologist noted disc desiccation with a disc protrusion extending into the anterior epidural region. (Px. 3, p. 15-16) On February 8, 2011, the Petitioner was seen by Dr. Khanna again, at which time he complained tingling radiating down his legs, intermittently. His straight leg raising returned to normal, bilaterally. (Px. 1, p. 15 Dr. Khanna recommended physical therapy, three times per week for three weeks, and kept the Petitioner on modified duty, though no work was being offered by Respondent. (Id.)

Having failed to improve in his initial 3 weeks of care with the company clinic, and after being told that the would be a delay in authorizing the physical therapy, the Petitioner sought out his own treating physician, and was seen by Dr. Fernando Perez, a chiropractor, at Marque Medicos on February 9, 2011. (Px. 2, p. 31-33) Noting a consistent history and presentation, Dr. Perez commenced physical therapy and recommended that the Petitioner be taken completely off of work. (Id.) Dr. Perez referred the Petitioner to Dr. Andrew Engel, a board certified pain management specialist, who saw him on February 17, 2011. Dr. Engel recommended and provided a series of medications, and recommended ongoing physical therapy. (Px. 3, p. 55-56) Dr. Engel later recommended a

diagnostic medial branch block injection, which was performed on April 6, 2011 at L5 and at S1. (Id., p. 140-141) The Petitioner experienced immediate, though brief, relief of his low back pain, after the injection.

On April 14, 2011, a second medial branch block was recommended by Dr. Engel, and the Petitioner was given a light duty note. He testified that he called the Respondent offering to return with restrictions, and left a voicemail for his supervisor, Terrell Jones. Mr. Jones was present as a representative of the Respondent at trial, but was not called to testify. The Petitioner testified that Mr. Jones left him a voicemail shortly thereafter, stating that he could only return upon being released to full duty. Through the date of the hearing, no offer of light duty was ever made to the Petitioner.

On April 20, 2011, the second medial branch block was performed at L5 and atS1, with the same result. (P 3, p. 138-139) In his evidence deposition testimony, Dr. Engel explained that the medial branch block injections ar purely diagnostic in nature, as a tool to diagnose and confirm facet-mediated pain. (Engel Dep. Tx. P. 17-19) Dr. Engel testified that the briefly positive responses to the medial branch blocks constituted a positive diagnostic test, and as a result warranted his recommendation of a radiofrequency ablation at L5-S1 as a treatment modality, which was performed on May 18, 2011. (Id., p. 32-33) The Petitioner testified that he experienced moderate improvement after the radiofrequency ablation, both functionally and in terms of pain relief, though he continued to fluctuate in h condition with good days and bad. On good days, according to the Petitioner, he continued to have moderate pain, and on bad days the pain was intense. The Petitioner testified that he had between 3 and 4 bad days per week.

A functional capacity evaluation with validity testing was performed on June 20, 2011, the results of which placed the Petitioner at the medium physical demand level, while noting ongoing objective functional deficits and s signs of symptom magnification. (Px. 6, p. 3) On June 29, 2011, Dr. Engel noted ongoing low back pain at 4 out of 10 on the visual analog scale, and recommended that the Petitioner see Dr. Robert Erickson, a neurosurgeon, for a consultation. (px. 3, p. 43) Physical therapy was discontinued, with home exercises recommended. (Id.) On or about July 28, 2011and prior to his visit with Dr. Erickson, the Petitioner suffered a temporary exacerbation of his low back pain, after losing his balance while standing on a one foot high stepping stool to change a light bulb. He hopped off of the stool landing on his feet, at which time he experienced a significant increase in low back pain for few days, after which his pain levels lessened, but continued to fluctuate as before.

Dr. Erickson saw the Petitioner on August 5, 2011, at which time he made note of both the January 17, 201 accident at work, as well as the recent incident at home, regarding which he commented specifically that there was no change in the distribution of his pain and no radicular complaints. (Px. 4, p. 5) Dr. Erickson recommended a Medrol Dosepak, and discussed the possibility of surgical intervention at L5-S1 if no improvement were seen. (Id.) On October 26, 2011, a discogram was performed by Dr. Engel at L4-L5 and at L5-S1. (Px. 3, 136-137) The L4-5 level was found to be completely normal, whereas pressurized injection at the L5-S1 level created 8/10 concordant bilateral low back pain. (Id.) Dr. Engel noted a leak at that level as well, which he testified was secondary to an annular tear. (Id.) The discogram was noted to have been positive at L5-S1 for discogenic pain. (Id.)

The Petitioner continued to have follow-up appointments with Dr. Engel and Dr. Erickson, attempting additional physical therapy and ongoing prescription medication management with no relief. On May 11, 2012, he was seen by Dr. Erickson, who recommended instrumented lumbar fusion at L5-S1, due to the Petitioner's lack of improvement with conservative care. (Px. 4, p. 9) Dr. Erickson performed the surgery on July 13, 2012. (Id., p. 10-11) The Petitioner followed up with Dr. Erickson on August 3, 2012, at which time he noted that "the patient has responded beautifully". (Px. 5, p. 1) As of the date of trial, the Petitioner testified to significant improvements functionally after the surgery, with regard to strength and mobility. He testified that he is able to walk more, can move without pain on a frequent basis, and only experiences small brief incidences of pain on occasion. Prior to th

surgery, the Petitioner was unable to sit or stand for prolonged periods, and experienced frequent low back pain of greater intensity. The Petitioner testified that he is happy that he underwent the surgery.

Dr. Engel testified that the Petitioner suffered from both discogenic and facet mediated pain at L5-S1, due t his accident at work on January 17, 2012. Noting ongoing limitation to extension and flexion, Dr. Engel testified th this would be consistent with a facet mediated component, which he testified would not be identifiable via MRI in traumatic, as opposed to degenerative, situation, and testified that this injury was consistent with a lifting event as suffered by the Petitioner. (Engel Dep. Tx., p. 17-19) He explained that the medial branch block and confirmatory medial branch block were the only viable means of diagnosing this condition, and were solely diagnostic in nature. With both injections being positive for immediate pain relief, Dr. Engel diagnosed a facet mediated component, while not ruling out a discogenic factor in the Petitioner's pain, and proceeded with radiofrequency ablation. Dr. Engel noted that his pain was reduced and his physical examination thereafter was not positive for facet mediated pain, though the discogenic component of his condition continued, as diagnosed via discography on October 26, 2011. (Engel Dep. Tx., p. 41-43) Dr. Engel explained the steps taken, in accordance with the medical literature regarding discography, in order to insure a valid result and further explained the significance of the Petitioner's positive, concurrent results at L5-S1. (Id. P. 51-56) He noted that under these conditions, the false positivity rate o a discogram is reduced to nearly zero. (Id. P. 55) Dr. Engel testified that the concordant pain at L5-S1 was consistent with the Grade 4 annular tear seen on the corresponding CT scan, which corresponds with the MRI findings at that level, and supported the diagnosis of ongoing discogenic pain at L5-S1. (Id., p. 61-64)

The evidence deposition testimony of Dr. Richard Kermit Adkins, the Respondent's utilization review physician, was also submitted. Dr. Adkins, a pain management specialist, reviewed the physical therapy performed by Marque Medicos, non-certifying all but 9 sessions. He also non-certified the medial branch blocks performed by Dr. Engel, based on an assertion that they would be inappropriate in the context of radiculopathy. The non-certifications were based on the Official Disability Guidelines. Dr. Adkins testified that he does not use these guidelines at all in his own practice, and in fact utilizes the International Spinal Interventional Society guidelines, o which he acknowledged that Dr. Engel is a member of the Standards Committee. (Adkins Dep. Tx., p. 17-19) This is supported by the curriculum vitae submitted with Dr. Engel's testimony. Dr. Adkins testified that he believes Dr. Engel has a very good reputation and is a very honorable physician. (Id. P. 18) Dr. Adkins acknowledged that he was given the Official Disability Guidelines directly by Genex, as the basis for his review. He testified consistently with Dr. Engel's explanation regarding the purpose and benefits of medial branch blocks, and acknowledges that D Engel and Dr. Singh never noted radiculopathy. (Id., p. 25-28) Dr. Adkins admitted that the radicular symptoms to which he cited could have been referred pain due to facet injury, in which case the medial branch blocks would hav been appropriate. (Id., p. 27)

Two lay witnesses testified for the Respondent at trial, Raul Melasio and Ray Gaytan. They both s filled ou written statements on February 18, 2011. The Petitioner's Application for Adjustment of Claim was filed three day prior, on February 15, 2011. Mr. Melasio testified that Human Resources came to him on the February 18, 2011 to investigate the Petitioner's claim, at which time he filled out his report. Mr. Gaytan, testified that the very same da he walked into HR himself to inquire regarding the Petitioner's claim, prompted by a conversation with Mr. Melasi that day. Both witnesses are currently employed by the Respondent. Mr. Melasio testified that the Petitioner told hi he injured his back at home on January 10, 2011 and was complaining of low back pain the entire week leading up January 17, 2011. Mr. Melasio testified that he offered the Petitioner lighter work but he refused. Mr. Gaytan testified that the Petitioner told him he injured his low back at home in December of 2010, and that he offered to help the Petitioner and switch jobs with him but that the Petitioner refused.

Two Section 12 reports were submitted by the Respondent at trial, authored by Dr. Kern Singh. Dr. Singh opined that the Petitioner suffered a mere lumbar strain, which was not related to his accident at work because the

accident never occurred according to witness statements. Dr. Singh noted decreased disk height at L5-S1, with decreased signal intensity, which he stated were pre-existing in nature, and any treatment would be due to the pre-existing degenerative disc disease.

ACCIDENT

The Arbitrator finds that the Petitioner sustained an accident at work on January 17, 2011, consistent with his testimony at trial and consistent with the histories set forth in the medical records of his treating physicians. The Arbitrator had the opportunity to personally observe the testimony, demeanor, and behavior of the Petitioner, as well as the two lay witnesses for the Respondent. The Arbitrator finds that the Petitioner testified credibly through direct and cross examination. The Arbitrator further finds that both Raul Melasio and Ray Gaytan lacked credibility throughout their testimony.

CAUSATION

The Arbitrator finds that a causal relationship exists between the Petitioner's injury at work on January 17, 2011, and his current condition of ill-being. The Arbitrator bases his decision on the Petitioner's credible testimony, the consistent sequence of events, the corroborating medical treatment records, and the persuasive medical opinions of the treating physicians. The Arbitrator is not persuaded by the Respondent's Section 12 reports.

MEDICAL

Having found that the Petitioner's current condition of ill being is causally connected to the Petitioner's work accident of January 17, 2011, the Arbitrator further finds that the medical treatment provided to the Petitioner was reasonable and necessary. The Arbitrator relies on the persuasive opinions of the Petitioner's treating physicians as well as the credible testimony of the Petitioner. The Arbitrator is not persuaded by the Respondent's utilization review opinions. Therefore, the Arbitrator finds that the Respondent is liable for the claimed medical bills.

TEMPORARY TOTAL DISABILITY

The Respondent's defense on this issue is premised on accident and causation, which have been resolved in favor of the Petitioner. Therefore, the Arbitrator finds that the Respondent is liable for the claimed temporary total disability benefits.

CREDIT

The Respondent has claimed a credit for $1,546.65 for alleged overpaid temporary total disability benefits. The Arbitrator finds that the Respondent is entitled to this credit, which shall be assessed against the award of temporary total disability benefits, but not as any overpayment.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PAUL McADON,

Petitioner,

vs. NO: 12 WC 42753

14IWCC0366

MILLENNIUM KNICKERBOCKER HOTEL,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, medical expenses, prospective medical treatment, Section 19(*l*) penalties, and temporary total disability benefits, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

As to the issue of temporary total disability benefits, the Commission views the issue slightly different than the Arbitrator and modifies the award of temporary total disability benefits.

The Commission has considered the facts of this matter and views them as follows:

Petitioner was injured on November 12, 2012, when he sustained a documented injury to his right shoulder while traversing down a flight of stairs at his place of employment. Subsequent to said accident, Respondent directed Petitioner to the offices of Concentra Medical Center.

Petitioner received medical care at Concentra in Chicago on November 12, 2012. At that time, he was released to return to work with restrictions of: no lifting over 5 pounds, no pushing/pulling over 10 pounds of force and no reaching above the shoulder.

Petitioner returned to Concentra in Chicago and on November 19, 2012, his restrictions were changed. At that time, they were modified to: no lifting over 15 pounds, no pushing/pulling over 20 pounds of force and no reaching above the shoulder.

By his testimony, Petitioner stated that he returned to work for Respondent and performed the full measure of his duties, at least through December 31, 2012. He admitted that his employment with Respondent was terminated effective December 31, 2012, and that he was notified of said termination prior to his date of accident.

After his termination, Petitioner returned to his home in Durham, North Carolina, and began treating with a Concentra Medical Center in Durham. On January 14, 2013, he was seen by Dr. Lawrence Yenni. At that time, they discussed the results of an MRI that was performed on December 10, 2012, at the Durham Diagnostic Imaging. Dr. Yenni commented that Petitioner had findings consistent with a small partial supraspinatus tear. He also commented regarding the possibility of bicipital anchor/labral issue. He ordered an MRI with contrast arthrogram due to Petitioner's increased pain.

On February 14, 2013, Dr. Yenni again saw Petitioner. By his assessment, Petitioner had a tear of the superior labrum both anteriorly and posteriorly. Dr. Yenni stated in part: "He wants to proceed with surgery. We will get him set up at his convenience. It should be noted that he is currently not working, but it is not that he is unwilling to work in the sense that I am not allowing him to work due to limitation of his shoulder. He was released today with restrictions once his questions were answered."

The record demonstrates that Petitioner was working the full measure of his employment from November 12, 2012, until he was discharged effective December 31, 2012. It is also apparent that he was capable of performing his work, full duty, and that he continued to do so.

He was seen by Dr. William Mallon of Triangle Orthopedic Associates in Durham on December 20, 2012. By the note of Dr. Mallon, it was indicated that he would continue the previously imposed restrictions of no lifting greater than 10 pounds and no overhead work. It is readily apparently that this did not preclude Petitioner from pursuing his full duty employment.

Petitioner was questioned on cross examination and stated, at page 64 of the record in pertinent part:

Q. Do you agree that, currently, if your job as director of rooms and revenue was available to you, that you could physically do it today?

A. I do.

Q. You agree with that statement?

A. Yeah.

Q. And that's been the case the entire time from the date of the accident until now, correct?

A. Absolutely.

Petitioner argues that under the tenants of Interstate Scaffolding v. IWCC, 236. Ill.2d 132 (2010), he is entitled to either employment or continuing temporary total disability benefits after he sustains an injury, so long as his condition has not reached a state of maximum medical improvement. The Commission disagrees with Petitioner and the Arbitrator and distinguishes this matter from Interstate.

In Interstate the claimant was not capable of performing the full duties of his job. He was placed in a light duty position, which by definition accommodated the claimant's restrictions. That was not the case here.

In this case, Petitioner, though injured, was capable of performing the full duties of his employment. Though one can argue that he had restrictions immediately after his accident, he admitted that even with those restrictions he was capable of full duty work. It is for this reason that the Commission distinguishes this matter from Interstate.

Petitioner notes on page 18 of his Reply Brief that his treating surgeon indicated that his condition has worsened and that Petitioner was then in need of surgery. That statement, as listed above, was made by Dr. Yenni on February 14, 2013.

The Commission finds that Petitioner's condition worsened such that he is in need of surgery and that he is entitled to receive temporary total disability benefits from February 14, 2013, through April 24, 2013, the date of the hearing.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision is modified as stated herein.

14IWCC0366

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $993.59 per week for a period of 14-2/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $803.74 for medical expenses and prospective medical treatment in the form of right shoulder surgery as recommended by Dr. Yenni under §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the sum of $3,420.00 pursuant to Section 19(*l*) without further day.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $18,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 16 2014
TJT: kg
O: 3/17/14
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

McADON, PAUL
Employee/Petitioner

Case# **12WC042753**

MILLENNIUM KNICKERBOCKER HOTEL
Employer/Respondent

14IWCC0366

On 6/10/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0140 CORTI ALEKSY & CASTANEDA
RICHARD S ALEKSY
180 N LASALLE ST SUITE 2910
CHICAGO, IL 60601

1564 HINSHAW & CULBERTSON LLP
PETER H CARLSON
222 N LASALLE ST SUITE 300
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Paul McAdon
Employee/Petitioner

v.

Millenium Knickerbocker Hotel
Employer/Respondent

Case # **12** WC **42753**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Milton Black**, Arbitrator of the Commission, in the city of **Chicago**, on **April 24, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **November 12, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned **$77,499.76**; the average weekly wage was **$1,490.38**.

On the date of accident, Petitioner was **49** years of age, ***married*** with **3** dependent children.

Respondent ***has partially*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

Respondent shall pay reasonable and necessary medical services of **$953.74**, as provided in Section 8(a) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$993.59**/week for **16 2/7**^{ths} weeks, commencing **January 1, 2013** through **April 24, 2013**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **January 1, 2013** through **April 24, 2013**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay **$803.74** for medical services, as provided in Section **8(a)** of the Act. Respondent is to pay any unpaid balances with regard to said medical expenses directly to Petitioner. Respondent shall pay any unpaid, related medical expenses according to the fee schedule or the negotiated rate and shall provide documentation with regard to said fee schedule or negotiated rate calculations to Petitioner. Respondent is to reimburse Petitioner directly for any out-of-pocket medical payments.

Respondent shall authorize and pay for right shoulder surgery as recommended by Dr. Lawrence Yenni.

Respondent shall pay to Petitioner penalties of $ **$3,420.00**, as provided in Section 19(l) of the Act.

Petitioner's claims for penalties as provided in Section 19(k) of the Act and for attorneys fees as provided in Section 16 of the Act are denied.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Milton Black

Signature of Arbitrator

June 7, 2013
Date

ICArbDec19(b)

JUN 10 2013

FACTS

Petitioner testified in his case in chief, as an adverse witness, and as a rebuttal witness. He testified that he was employed pursuant to written contract (PX7) as Director of Rooms and Revenue in Respondent's Chicago hotel. Petitioner testified that he was authorized to work from home in Durham, North Carolina. Petitioner testified that on November 12, 2012, he was injured while performing his duties at the hotel. He testified that three or four days earlier he had a one on one meeting with Respondent's general manager, Jim Gould. Petitioner testified that Jim Gould told him that his services would no longer be required, that his employment would be ending, that the reason was due to working remotely from Durham, that he was doing an effective job, but that the corporate office did not like him working from Durham.

Petitioner testified that on November 12, 2012, there was an important scheduled sales event that was to be attended by 20 guests, including Respondent's president, vice president, several directors of sales, and sales managers. Petitioner testified that the guests were to stay at the hotel and that the general manager wanted everything to be perfect. Petitioner testified that it would be embarrassing if even one room were not up to par.

Petitioner testified that guest rooms were blocked out and spread between the twelfth and the ninth floors. Petitioner's testified that he spent the morning of November 12, 2012 with Rosa Guzman, the chief housekeeper, in a meeting regarding the status of keeping the rooms perfect and determining their vacancy and occupancy. Petitioner testified that checkout time at the hotel was 12 o'clock but that it was not rigidly enforced. Petitioner testified that he met with her in the afternoon around 1 o'clock to get together for the last inspection. He testified that he had a documented room list, with names and numbers, which he also used as a guide where

he could write notes. He testified that the accident occurred about 2:30 or 3 o'clock in the afternoon.

Petitioner testified that they began their inspection on the twelfth floor and worked their way down. He testified that the first room was not close to done and that he set a 3 o'clock check-in target time for all the rooms. He testified that we when he went into the first room, some of the room attendants were still at lunch. He testified that when they were done with the twelfth floor they took the stairway to the eleventh floor and repeated the same activity. He testified that he had documents and was keeping notes. He testified that Rosa Guzman was participating, that they were working as a team, and that they were both under the same pressure. He testified that his pace was close to a jog. He testified that they then took the stairway and repeated the same activity on the tenth floor. He testified that on his way down between the tenth and ninth floor he got too close to and ran into an electrical junction box on the side of the wall. He testified that during the inspection activity he was talking to Rosa Guzman, but he didn't recall if they were actually talking at the time of the accident. He testified that she was utilizing a hand-held radio.

Petitioner testified that the stairwell consisted of two flights with a landing in between. He testified that the stairwell was properly lit and that the stairs were not defective. Petitioner was handed photographs taken by Respondent showing a junction box on a wall before the ninth floor (PX8). While testifying, he took the photos with his left hand. He testified that the stairwell was open for anyone to use including guests, but that although the general public could use the stairs, the stairs were in an obscure location and not readily located, because there were three banks of elevators. He testified that he was uncertain if he knew the electrical boxes were there before the accident. He testified that he had taken the stairwell a handful of times before the accident.

Petitioner testified that Rosa Guzman was behind him, that she had a room list, that he was discussing something with her, and that they were moving quickly. He testified that he slammed into the junction box, was spun around, jumped down two stairs, and came to rest on a landing. He testified that Rosa Guzman did not see the fall, but that when she got to his location in the stairway she looked stunned with her mouth open. He

testified that he wanted to get the two remaining rooms done but that Rosa Guzman said he should report his injury to the human resources department. He testified that he then reported his accident to Lisa Shields who set up his first medical appointment at Concentra in Chicago. Petitioner was given physical restrictions, which Respondent accommodated.

Petitioner testified that his employment ended on December 31, 2012, that he has been unable to work since that date, and that no doctor has released him to full duty. He testified that he injured his right shoulder and his back. He testified that he is right-handed. He testified that he continued his treatment in North Carolina. Petitioner testified that his current treatment is with Triangle Orthopedic Associates and that due to unsuccessful physical therapy one of those physicians, Dr. Lawrence Yenni, has recommended right shoulder surgery.

Petitioner was examined by Dr. Joseph Barker at Respondent's request. Dr. Barker opined that Petitioner's right shoulder injury but not back injury was caused by his work accident, that Petitioner was not at maximum medical improvement, and that Petitioner could consider right shoulder arthroscopy, labral debridement, open long head of biceps tenodesis, and subacromial decompression (RX1).

Rosa Guzman testified in Respondent's case in chief. She testified that she is the hotel housekeeping manager and that she reported to Petitioner, who was her superior. She testified that the time of the accident was about 3 PM. She testified that she and Petitioner were walking together at the top of the stairs, that he then moved ahead of her, that at the specific time of the accident she was behind him and could not see him, that she heard him yell "ouch", that she ran downstairs, that she heard him say "I hurt my shoulder", and that she saw him at the bottom of the stairs. She testified that she saw an electrical box. She testified that the time of the accident there were two rooms left to complete and that the rooms had to be ready by 4 PM. She testified that checkout time was 12 o'clock and that check-in time was at 3 PM. She testified that Petitioner was walking at a normal pace but that he was a tall man and she could never keep up with him. She testified that she inspected

the last two rooms, which were done by 4 PM. She testified that when she was working, it was at a quick pace.

Lisa Shields testified in Respondent's case in chief. She testified that the rooms were to be completed by 4 o'clock. She testified that she took photographs but not of the actual accident scene (PX8). She testified that she is charged with responsibility for and is familiar with the law of Worker's Compensation but that she is not familiar with the case law. She testified that she completed an accident form (PX9). She testified that she had other documents but did not bring them to the hearing. She testified that she did not doubt that Petitioner fell in the stairwell. She testified that there had been a meeting with Petitioner, Rosa Guzman, and herself about the "VIP" inspection. She testified that she was aware that only two rooms were left to be inspected at the time of the accident. She testified that she read the reports from Concentra, that there was nothing inconsistent in them, that she paid the bills, that she filed the reports in Petitioner's file, and that she forwarded them to the insurance company. She testified that it was initially determined that Petitioner's accident was covered under Workers Compensation but that during Respondent's investigation, Respondent reversed its position. She testified that she did not make the final decision but that she participated in the decision-making. She testified that the basis of the changing of mind was the act of what Petitioner was doing, which was simply walking down the stairs. She testified that Respondent's denial was not because Petitioner was a director.

ACCIDENT

This is the central issue. It is undisputed that Petitioner was injured in the course of his employment. What is disputed is whether or not that injury arose out of Petitioner's employment. The focus of this issue is on Petitioner's work activity. The dispositive inquiry is whether or not there was an increased risk.

Petitioner testified credibly throughout each phase of the hearing that it was extremely important to have certain rooms on four floors properly prepared on time for Respondent's corporate leadership. Those rooms were to be ready by a certain time and were supposed to be in perfect condition for the VIP guests. Petitioner testified there was pressure to get the rooms done on time and that he and Rosa Guzman were moving quickly. Rosa Guzman corroborated that when she was working, it was at a quick pace. Petitioner testified that he had

documents and was keeping notes. He testified that during the course of the inspection activities he was talking to Rosa Guzman and that she was utilizing a hand-held radio. Petitioner testified that although the stairwell was open for guests, the stairs were in an obscure location and not readily located, because there were three banks of elevators. It is reasonable to infer that if time were not of the essence, then Petitioner and Rosa Guzman could have leisurely taken the elevators.

Based upon the foregoing, the Arbitrator finds that there was an increased risk to Petitioner as compared to the risk to the general public. Therefore the Arbitrator finds that Petitioner sustained an accidental injury that arose out of and in the course Petitioner's employment by Respondent.

CAUSATION

Petitioner testified credibly that his right shoulder injury and his low back injury were as the result of the claimed accident. Petitioner's testimony is corroborated by the medical records and is consistent with the sequence of events.

Based upon the foregoing, the Arbitrator finds that Petitioner's current condition of ill being is causally related to the accident.

PAST MEDICAL SERVICES

Respondent's dispute on this issue is premised upon liability for accident, which has been resolved in favor of Petitioner.

Therefore, the claimed medical bills shall be awarded.

PROSPECTIVE MEDICAL CARE

Petitioner testified credibly that Dr. Yenni has recommended right shoulder surgery. Dr. Barker's report is in accord.

Therefore, the requested right shoulder surgery should be authorized.

TEMPORARY TOTAL DISABILITY BENEFITS

The focus of this issue is on Petitioner's medical condition. The dispositive inquiry is whether or not the medical condition has stabilized. The focus of this issue is not on the employment relationship.

The nature of Petitioner's injury has resulted in restricted work duties. He has testified credibly that no physician has released him to full duty. The medical records and the medical reports corroborate that he is not at maximum medical improvement. Respondent had accommodated the physician imposed restricted duties through December 31, 2012. Thereafter, Respondent stopped accommodating the work restrictions and did not commence temporary total disability benefits.

Based upon the foregoing, the Arbitrator finds that Petitioner's claimed temporary total disability benefits should be awarded.

PENALTIES AND FEES

Lisa Shields testified the basis of the denial of benefits was the act of what Petitioner was doing, which she described as simply walking down the stairs. No other reason is given.

However, Petitioner and Rosa Guzman were working on a time critical inspection project involving corporate leadership. They were moving quickly from one floor to another and using stairway access to facilitate their pace. The rooms were to be ready and "perfect" within a specified time frame. During the process of hastened inspection through four floors, 20 rooms, and three sets of stairways and while holding documents and keeping notes, Petitioner banged into a protruding electrical junction box on the side of the wall. Petitioner was doing more than the isolated act of simply walking down the stairs. Petitioner's benefits ought to been commenced.

Based upon the foregoing, the Arbitrator finds that Petitioner is entitled to $30.00 per day for the failure to commence temporary total disability benefits without good and just cause pursuant to Section 19 (l) of the

Act.

The Arbitrator does not find that Respondent's misapplication of the law rises to the level of unreasonable, vexatious, or frivolous. Therefore, the Arbitrator denies Petitioner's claims for penalties under Section 19 (k) of the Act and attorneys fees under Section 16 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF La SALLE)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Marquez,
Petitioner,

vs.

NO: 10 WC 02418

14IWCC0367

Steinburg Furniture Inc. ,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses and mileage reimbursement and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator with additional reasoning, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission provides additional reasoning in support of the November 13, 2012 Decision of the Arbitrator as follows:

In the prior March 19, 2010 Section 19(b) Arbitration Decision, Arbitrator Giordano found Petitioner did sustain an accident with injury to the lumbar spine in the scope and course of employment on March 28, 2009 and ordered that the issue of prospective medical treatment for the back would be determined at a later date after an examination by a board certified neurosurgeon, to be agreed upon by both parties or by another hearing on the matter. The parties then agreed upon an examination with Dr. Alexander Ghanayem, a board certified spinal surgeon at Loyola. Petitioner traveled from his home in DePue, Illinois to Dr. Ghanayem's offices in Maywood, Illinois and Burr Ridge, Illinois. Dr. Ghanayem gave recommendations for Petitioner's care and Petitioner chose to continue treating with Dr. Ghanayem for his lumbar spine. Petitioner testified that he trusted Dr. Ghanaeym and wished to continue treatment with him. After a failed course of conservative treatment, Dr. Ghanayem recommended and performed bilateral partial medial fasciectomies at L3-4, L4-5 and L5-S1 with posterior lateral fusion at L3-4 and L4-5 using instrumentation and bone autograft.

Petitioner returned home after surgery and underwent physical therapy as recommended by Dr. Ghanayem. On October 21, 2011, the record indicates Petitioner was lifting over twenty pounds during postsurgical therapy that included lumbar stabilization exercises when he experienced pain in his stomach along with nausea and tightness in the area. Petitioner was diagnosed with an umbilical hernia. Dr. Wojcik recommended laparoscopic repair but the surgery was not approved by Respondent. When Petitioner returned to Dr. Ghanayem for follow-up care he advised the doctor of his abdominal pain during physical therapy, and Dr. Ghanayem agreed with Dr. Wojcik's diagnosis of umbilical hernia. Dr. Ghanayem also noted that Petitioner continued to experience back pain and recommended a revision lumbar fusion procedure. Dr. Ghanayem reported that he would like to fix the hernia at the same time as the anterior approach fusion revision procedure. Dr. Ghanayem noted that Respondent's Section 12 examiner, Dr. Bernstein, also recommended a revision fusion but preferred a posterior approach. Dr. Ghanayem explained that the posterior approach favored by Dr. Bernstein would not comply with the standard of care at the time. Dr. Bernstein had opined that the anterior approach recommended by Dr. Ghanayem would also be appropriate.

The Arbitrator found in her November 2012 decision, after careful consideration of the testimony and medical evidence, that Petitioner's umbilical hernia condition was causally related to the work injury of March 28, 2009 as it occurred during the rehabilitation process for the same. Respondent was ordered to authorize the recommended surgery for the umbilical hernia to be performed during the revision fusion surgery, so Petitioner would be exposed to one fewer surgical procedure.

Respondent argues that while Dr. Ghanayem was chosen by agreement of the parties for an evaluation, Petitioner voluntarily chose to continue treating with him after the initial evaluation. Further, Respondent argues that there is no evidence in the record that it agreed to provide mileage reimbursement to Dr. Ghanayem. Petitioner submitted into evidence a series of five letters directed to Respondent's counsel as Petitioner's Exhibit 13. The letters detail Petitioner's understanding that Respondent would reimburse Petitioner $100.00 for travel from his home in DePue, Illinois, near Ottawa, to treat with Dr. Ghanayem outside Chicago, Illinois. There is no evidence in the record of a response by Respondent to any of the correspondence contained in PX13. Petitioner also testified to such an agreement (T. 24). Mileage reimbursement was an issue delineated on the Request for Hearing form submitted into evidence as Arbitrator's Exhibit 1. Respondent was provided the opportunity to object to Petitioner's Exhibit 13, cross-examine Petitioner and provide its own evidence at hearing to refute Petitioner's testimony and documentary evidence regarding travel expenses and any alleged agreements regarding such expenses.

Pursuant to *General Tire & Rubber Company v. Industrial Commission*, 221 Ill.App.3d 641, 582 N.E.2d 744, 164 Ill.Dec. 181 (5th Dist. 1991), the Commission notes that it has the authority to award Petitioner reimbursement for treatment-related travel expenses that are reasonable and necessary under Section 8(a) of the Act. The Commission finds that it was reasonable for Petitioner to continue treatment with Dr. Ghanayem, a board certified physician, whom both Petitioner and Respondent agreed upon to render an opinion regarding Petitioner's prospective care and whom Petitioner trusted. Further, while Respondent questions Petitioner's decision to travel to Chicago for treatment, it apparently found such travel reasonably convenient for an examination by Dr. Ghanayem, as well as its own Section 12 examiners, Dr. Palacci and Dr. Bernstein.

14IWCC0367

Petitioner has continued to treat with Dr. Ghanayem for his back. Dr. Ghanayem and Dr. Wojcik have both recommended Petitioner undergo surgery for his umbilical hernia. Dr. Ghanayem has recommended Petitioner undergo a revision lumbar fusion with anterior approach and umbilical hernia surgery at the same time. Section 12 examiner Dr. Bernstein has opined the anterior approach as recommended by Dr. Ghanayem is appropriate, and Dr. Ghanayem has explained why the posterior approach is not at this time. Dr. Ghanayem is the only physician in the record ready to perform an anterior approach fusion revision at the same time as repair of the umbilical hernia. Petitioner wishes to proceed with the treatment as recommended by Dr. Ghanayem. The Commission finds this treatment and related travel reasonable and necessary.

The evidence in the record suggests Petitioner believes $100.00 travel reimbursement per trip to and from the Chicago metro area to see Dr. Ghanayem is reasonable. The Commission notes the Petitioner's proposed reimbursement of $100.00 per trip is at or slightly below the State of Illinois mileage reimbursement rate from 2010 to 2012. Petitioner has traveled 21 times to Dr. Ghanayem without reimbursement by Respondent. The Commission finds the Arbitrator's award of $2,100.00 for past travel expenses to be reasonable.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 13, 2012 is hereby affirmed and adopted with additional reasoning.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $10,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 16 2014

Daniel R. Donohoo

Ruth W. White

Charles J. DeVriendt

o-03/19/14
drd/adc
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

MARQUEZ, JOHN
Employee/Petitioner

Case# **10WC002418**

14IWCC0367

STEINBERG FURNITURE INC
Employer/Respondent

On 11/13/2012, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.15% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1097 SCHWEICKERT & GANASSIN
SCOTT J GANASSIN
2101 MARWUETTE RD
PERU, IL 61354

0507 RUSIN MACIOROWSKI & FRIEDMAN LTD
BRENT HALBLEIB
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF LaSalle)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

John Marquez,
Employee/Petitioner

v.

Steinberg Furniture, Inc.
Employer/Respondent

Case # **10** WC **02418**

Consolidated cases: **n/a**

14IWCC0367

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert Falcioni**, Arbitrator of the Commission, in the city of **Ottawa**, on **September 27, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **: Mileage Reimbursement**

14IWCC0367

FINDINGS

On the date of accident, **March 28, 2009**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$21,308.94**; the average weekly wage was **$409.78**.

On the date of accident, Petitioner was **39** years of age, ***single*** with **no** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$n/a** for TTD, **$n/a** for TPD, **$n/a** for maintenance, and **$n/a** for other benefits, for a total credit of **$n/a**.

Respondent is entitled to a credit of **$n/a** under Section 8(j) of the Act.

ORDER

Pursuant to Section 8(a) of the Act, the Respondent shall authorize umbilical hernia surgery to the Petitioner as recommended by his physicians as the same was caused by his physical therapy activities he was engaged in for the treatment of his work related back injury.

Pursuant to Section 8(a) of the Act, the Respondent shall authorize the Petitioner's lumbar spine surgery through an anterior approach as recommended by his treating physician, Dr. Alexander Ghanayem.

The Respondent shall pay $100.00 each trip for related medical care to and from the Chicago area totalling $2,100.00 for 21 past trips.

Respondent shall pay reasonable and necessary medical services of the Petitioner as it relates to treatment of work related injuries to his back, left knee and umbilical hernia injuries, as provided in Sections 8(a) and 8.2 of the Act and as further set forth herein.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Albert E. John — October 4, 2012

Signature of Arbitrator — Date

ICArbDec19(b)

NOV 13 2012

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A hearing was held in this matter on September 27, 2012 on 19(b) and 8(a) Petitions. This hearing represents the second time an Arbitrator has been required to render a decision in this matter. On February 25, 2010, the first hearing was held on 19(b) and 8(a) Petitions of John Marquez. Px 7. A decision by Arbitrator James Giordano was issued March 17, 2010 which addressed, among other things, medical bills, temporary disability and prospective medical care regarding a proposed lumbar surgery. Id.

By the time of the initial arbitration decision in this case, the Petitioner had undergone substantial medical care for his March 28, 2009 injuries which included a rib fracture, multiple contusions, internal derangement of the left knee, cervical and lumbar complaints. Id. The Petitioner's work injury of March 28, 2009 occurred when he fell backwards out of a delivery truck, landing on the ground. Id. As noted in the prior decision in this case, the Petitioner suffered multiple injuries from his fall and then underwent tests and care for his left knee and cervical and lumbar spines. Id. He had undergone a left knee arthroscopy with a partial medial meniscectomy and debridement. He obtained treatment with Dr. Robert Mitchell for his left knee and Dr. Steven Delheimer for his spine issues prior to the decision. Id.

The March 17, 2010 decision provided for the payment of the medical bills, then outstanding, past due TTD and prospective medical care to the back. Id. The medical care required would be determined as a result of an examination by a board certified physician agreed upon by the parties. Id. As a result of the arbitration decision in this matter, the

Petitioner was next seen by Dr. Alexander Ghanayem, a board certified physician at Loyola University in Maywood, Illinois. Px 8 & 10.

On June 17, 2010, Dr. Ghanayem examined the Petitioner and reviewed the medical records surrounding his injury. Id. Dr. Ghanayem indicated the Petitioner was a warehouseman and delivery person for the Respondent, a furniture company. Id. He had fell on March 28, 2009 backwards off a delivery truck, injuring his left knee, back and ribs. Id. Dr. Ghanayem felt the Petitioner suffered an extension type of injury in the lumbar spine. Id. He recommended continued conservative care with injections. Id. If there was no improvement, surgical options would be next. Id. Mr. Marquez was provided an off work slip by Dr. Ghanayem and has continued to remain off work through the present hearing of September 27, 2012. Id.

Dr. Mitchell continued to see the Petitioner for his work related left knee injury. Px 2. On October 19, 2010, injections for the knee were provided as the Petitioner continued to complain of pain and discomfort following his first knee surgery of June 12, 2009. Px 2 & 3. At that time a left knee arthroscopy with partial medial meniscectomy and debridement procedure was performed. Id. After an additional left knee MRI on November 23, 2010, his next appointment with Dr. Mitchell was on December 7, 2010. At this appointment, it was recommended the Petitioner undergo a second surgery due to continued complaints of his knee buckling. Id.

His second left knee surgery occurred on January 5, 2011 at Illinois Valley Community Hospital. Id. It consisted of a left knee arthroscopy with partial medial meniscectomy with the removal of loose bodies. Id. The Petitioner reports this surgery was successful in reducing his pain but it did not completely remove all discomfort. On

March 28, 2011, Dr. Mitchell released the Petitioner to return back to work for his knee only. Px 2. He wrote Mr. Marquez remained off of work for his back. Id. This physician further noted the second surgical procedure was related to the injury and the Petitioner may need injections in the future for the left knee injury. Id.

While undergoing his left knee treatment, Dr. Ghanayem visited with the Petitioner on November 10, 2010. Px 2 & 8. At that time, the doctor was concerned about the Petitioner's lack of progress in therapy and with an injection that was provided. Px 8. As a result, he was referred to Dr. Gnatz for a physical medicine and rehabilitation consult. Id.

In January of 2011, Dr. Gnatz first met with the Petitioner. Px 8 & 10. At that time, his chief complaint was low back pain which started following his work injury. He noted the following. "He has also been dealing with knee rehabilitation following his surgery. Id. Mr. Marquez has undergone back rehabilitation without real progress. Id. Along with his back pain, he has also experienced bilateral paresthesia into his lower extremities. Id." After being seen in follow up at Loyola on February 23, 2011 with continued pain and paresthesia, the Petitioner returned again on March 23, 2011. Id. At that time, Dr. Gnatz reported the Petitioner "..continues to have bilateral lower extremity tingling and back pain. Id." It was determined the Petitioner should return to Dr. Ghanayem for a lumbar fusion procedure. Id.

In April 2011, the Petitioner followed with Dr. Ghanayem and obtained an additional MRI. Id. Fusion was planned as the MRI demonstrated a Grade I to II anterolisthesis at L4-5, a mild loss of disc height at L5, disc narrowing at L3-4 and L4-5, among other findings. Id. Dr. Ghanayem reviewed the MRI and felt an L3-4 stenosis was

established by the testing. Id. It was also reported through a MRI of April 14, 2011 that the Petitioner had lumbar congenital spinal stenosis with a superimposed spondylosis most severe at L4-5. Id.

On May 17, 2011, John Marquez underwent lumbar decompression laminectomies with bilateral partial medial fasciectomies at L3-4, L4-5 and L5-S1 with a posterior lateral fusion at L3-4 and L4-5 using instrumentation and a bone autograft. Id. Following surgery, the Petitioner returned to physical therapy at City Center Physical Therapy in Peru, Illinois. Px 4.

While undergoing postsurgical physical therapy on October 21, 2011, the Petitioner reports his physical therapist required him to lift a bar with approximately 25 pounds of weight that was located on the floor. He testified that while lifting the weights from the ground, he experienced a painful sensation in his stomach, accompanied by a tightness in that area, along with nausea. As he continued his physical therapy, the discomfort grew worse. As a result, the same day he visited his family physician, Dr. Damien Grivetti. Px 11. The notes of his doctor explain he developed this pain and discomfort during exercise at physical therapy. Id. Following an examination, Dr. Grivetti reported the Petitioner experienced an umbilical hernia while doing exercises at rehabilitation. Id. He then referred the Petitioner to Dr. Wojcik where he was seen on November 8, 2011. Px 11 & 12.

Dr. Wojcik examined the Petitioner and reported he had a painful lump while performing physical therapy activities. Id. He noted Mr. Marquez developed a symptomatic and chronically incarcerated umbilical hernia. Px 12. Mr. Marquez also reported chronic back pain. Id. Dr. Wojcik attempted to schedule the Petitioner for a

laproscopic repair of his incarcerated umbilical hernia. Id. However, this surgery has not been approved by the Respondent.

On November 17, 2011, Dr. Ghanayem followed with the Petitioner. Px 8 & 10. His notes reflect that while Mr. Marquez was doing physical therapy, he developed abdominal pain. Id. He reported the Petitioner appeared to have an umbilical hernia. Id. He continues to experience back pain as well. Id. He explained the Petitioner appears to have developed a pseudoarthrosis at L3-4. Id. He ordered the Petitioner to follow up for his abdomen issue with Dr. Santaniello, physical therapy was placed on hold and he was told to remain off work. Id. Mr. Marquez was provided with a TENS unit and later underwent x-rays and a CT of the lumbar spine on November 17, 2011. Id. The November 17, 2011 CT scan demonstrated a lucency consistent with loosening along the shafts of both pedicle screws at L3. Id. Following this testing and the care recommended by his doctors for both his lumbar spine and umbilical hernia, the Petitioner reports his care stagnated due to the Respondent not approving care.

On May 2, 2012, Mr. Marquez also was seen at St. Margaret's Hospital for abdominal pain. Px 6. The emergency room records of that visit indicate Mr. Marquez had a sudden onset of umbilical pain due to his hernia. Id. He experienced abdominal pain along with a rectal bleed, internal hemorrhoids and an umbilical mass. Id. Since developing the hernia at therapy, Mr. Marquez testified his hernia pain has undergone multiple flare-ups.

He next followed with Dr. Ghanayem on July 19, 2012. Px 8 & 10. At that time, Dr. Ghanayem noted the Petitioner had continuing ongoing back pain. Id. He wrote there has not been approval to see Dr. Santaniello for the hernia the Petitioner sustained in

physical therapy. Id. Dr. Ghanayem reported he would like to perform the recommended fusion procedure. Id. He also indicated the hernia could be fixed at the same time as the back surgery as it makes sense to handle them at the same time. Id.

In Dr. Ghanayem's most recent note of September 12, 2012, he indicated concern the Respondent was not approving the umbilical hernia repair requested and the surgical procedure recommended for the lumbar spine. Px 8. He indicated the original fusion procedure should be revised from an anterior approach. Id. He notes Respondent's physician, Dr. Bernstein, has recommended a posterior approach. Id. Dr. Ghanayem reports the failure of the Respondent to provide approval for surgery from an anterior approach and to provide an updated CT scan has been medically damaging to the Petitioner and will have an adverse effect on the Petitioner's long-term outcome. Id. He explained the posterior approach favored by Dr. Bernstein would not comply with the standard of care at this time. Id. The screws placed in the prior fusion are loose with the halo created by screw movement now exceeding the diameter of the largest screws available for use in his lumbar spine. Id. Dr. Ghanayem further noted the screws may now be broken and, if so, this would be related to the delay in getting surgery authorized. Id.

The Respondent obtained two medical evaluations relevant to the present circumstances, Dr. Bernstein and Dr. Palacci. Rx 1& 2. Dr. Palacci indicated the Petitioner's umbilical hernia was not related to his employment. Id. He reported some physical therapy maneuvering can predispose one to an umbilical hernia but felt here the hernia was the result of the Petitioner's obesity. Id.

Dr. Bernstein also reports the Petitioner should undergo a fusion revision. Id. However, he recommends a posterior approach due to Petitioner's obesity. Id. Dr. Bernstein also reports Dr. Ghanayem recommends an anterior approach and states this is also an appropriate option. Id. Dr. Bernstein further opined a CT scan of the fusion site is also appropriate to better evaluate Petitioner's pedicles and fusion mass. Id. The CT scan suggested by Dr. Ghanayem and Dr. Bernstein has been denied by the Respondent along with the anterior fusion procedure Dr. Bernstein recommended as an appropriate option. Px 8, Rx 1 & 2.

The Petitioner testified he has great trust in Dr. Ghanayem. He would prefer the surgical procedure as recommended by Dr. Ghanayem and would like to undergo this as soon as possible due to the continuing pain and discomfort he experiences. Relative to the umbilical hernia, he also would like to undergo this procedure as soon as possible as he feels that condition is worsening. He is having significant back pain which is accompanied by numbness through both buttocks and thighs to his toes. The pain and numbness is constant. He reports he has trouble on a daily basis with his ability to stand. He has pain at a 10 out of 10. He experiences very limited sleep due to pain, tossing and turning. He continues to use a cane each day as it provides him with limited relief.

Testimony was also obtained on an additional issue regarding travel expenses. After Dr. Ghanayem made recommendations for continued care, including surgery, a decision was required by the Petitioner on whether he wished to proceed with using his physician, Dr. Delheimer, or switching to Dr. Ghanayem for further care. An agreement was reached by the parties that the Petitioner would continue to follow up with Dr. Ghanayem for this care and treatment. Px 13. Because of the travel expense required to

and from the Chicago area from Spring Valley, Illinois, it was agreed the Petitioner would receive $100.00 per trip as reimbursement for his travel expense. Id. Despite the agreement reached by the parties, the Respondent has not issued reimbursement for 21 trips to and from the Chicago area for medical care and treatment. Id.

The Petitioner has outstanding medical bills as indicated in Px 1. These total $8,013.75. It has been agreed by the parties that the bills relating to the back are not in dispute and will be paid. Arb. Ex. 1. It is also agreed that if the hernia is determined to be related, those bills will also be paid. Id. There is also no dispute regarding the Petitioner's time off of work. It was agreed by the parties the TTD due has been paid to date. Id.

ISSUES

F. Is Petitioner's current condition of ill-being causally related to the injury?
K. Is Petitioner entitled to any prospective medical care?

This case involves a claim where the Petitioner was originally injured on March 28, 2009. Arb. Ex. 1. A hearing was held previously by the Commission on February 25, 2010. Px 7. That decision does not reflect any complaint or issue concerning an umbilical hernia. Id. The first reference to an umbilical hernia does not arise until October 21, 2011. On that day, the Petitioner visited with his family doctor, Dr. Damien Grivetti, and reported he had been doing exercise in physical rehabilitation for his back and felt a sharp pull in his abdomen while performing the same. Px 11. He was referred to Dr. Wojcik for further care. Id. Dr. Wojcik has the same history that the Petitioner experienced a hernia while performing physical therapy activities. Px 12. Hernia surgery was recommended by Dr. Wojcik. Id. Mr. Marquez was then seen by Dr. Alexander Ghanayem for his ongoing back complaints. Px 8. He also reported the Petitioner, while performing physical therapy activities, suffered an umbilical hernia. Id. He recommended surgery to repair the hernia and suggested he be seen by Dr. Santaniello for this to occur. Id. Dr. Ghanayem also felt the umbilical hernia repair and a proposed anterior fusion revision surgery should be performed at the same time. Id.

Although the Respondent obtained a medical evaluation from Dr. Palacci who reported the umbilical hernia was not caused by the physical therapy for the Petitioner's work injury, limited credibility is given to this opinion based upon the histories provided of the Petitioner's physicians, Dr. Grivetti, Dr. Wojcik and Dr. Ghanayem as well as Petitioner's unrebutted testimony. Px 8 & 12.

Following consideration of the testimony and evidence presented, this Arbitrator finds the Petitioner's umbilical hernia condition is causally related to his work injury as it occurred in the rehabilitation process for the same. Further, the Respondent shall authorize the recommended surgery for the repair of the hernia. This surgery is to be performed by Dr. Wojcik independently of the back surgery or to be performed during the fusion revision surgery by another physician so the Petitioner could be exposed to one less surgical procedure.

The Petitioner has been recommended to undergo surgery for his continued back complaints. The parties agree that a fusion revision surgery is reasonable to perform. Px 8 & Rx 1. However, the manner in which surgery is to be performed has been disputed and caused a delay in the care and treatment of the Petitioner's pseudarthrosis which has developed at L3-4. Px 8 & Rx 1. The Respondent's physician, Dr. Avi Bernstein, suggests a posterior approach for the surgery while the Petitioner's physician has recommended an anterior approach. Id. However, Bernstein also stated an anterior revision is also an appropriate option. The reasons provided for an anterior approach are compelling. These are provided in Px 8. A review of Dr. Ghanayem's note of September 12, 2012 provides that if the anterior approach is not taken, the Petitioner's health is in jeopardy. Id.

Following consideration of the testimony and evidence presented, this Arbitrator finds the back surgery as recommended by Dr. Ghanayem shall be authorized by the Respondent for the Petitioner.

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The parties have agreed there remain some outstanding bills related to the undisputed care and treatment rendered to the Petitioner. They have agreed the Respondent will pay all outstanding and future bills related to the Petitioner's spine care. It was further agreed the Respondent shall pay for all past and future care rendered or to be rendered the Petitioner for his umbilical hernia condition should this Arbitrator find this condition and the need for surgery is related to the Petitioner's work injury or care that followed from the same.

As already determined, this Arbitrator has found the Petitioner suffered further injury related to his work accident while performing physical therapy. It was while performing therapy the Petitioner suffered an umbilical hernia which required the care and treatment rendered the Petitioner and which further requires the recommended surgical repair. The bills already incurred for care and those rendered relative to his surgical repair are to be satisfied by the Respondent.

O. Other: Mileage Reimbursement.

As a result of the prior decision in this case, a third medical opinion was sought and obtained from Dr. Alexander Ghanayem. This physician was chosen by agreement of the parties. It was Dr. Ghanayem who recommended surgery. It was agreed between the parties that the Petitioner would follow up with Dr. Ghanayem for his continued care and treatment. Px 13. As a result, the Petitioner underwent surgery with Dr. Ghanayem and this same physician has also directed post-surgical care. Id. An additional surgery is now recommended.

The parties agreed, as indicated in Px 13, that the Respondent would provide a mileage reimbursement of $100.00 per trip to and from the Chicago area for the

Petitioner's continued care. Despite this agreement to provide $100.00 per trip to the Petitioner, no money has been forthcoming from the Respondent. As 21 trips to and from the Chicago area have occurred, the Respondent shall provide $2,100.00 to the Petitioner for his travel expense.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Greg Engleking,
Petitioner,

vs.

No. 07 WC 30212

Ashland Chemical,
Respondent.

14IWCC0368

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the Circuit Court of Illinois, Cook County, directing the Commission to re-evaluate several issues related to Section 8(j) credit, the "chain of events" analysis relied upon by the Arbitrator, and the award and calculation of penalties and fees. The Circuit Court specifically instructed and directed the Commission to discuss numerous findings of fact and conclusions of law contained in both the Arbitration and Commission Decisions. The Commission, after considering the issues of Section 8(j) credit, "chain of events" analysis, and penalties and fees, being advised of the facts and law, modifies its October 5, 2012 Decision as stated below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

This case was initially heard by Arbitrator Douglas Holland, who filed his Decision on December 30, 2011. Both parties appealed the Decision to the Commission, which affirmed and adopted the Arbitrator's Decision on the issues of causal connection, benefit rates, medical expenses, temporary total disability, and penalties and fees. The Commission modified the Arbitrator's award of Section 8(j) credit to Respondent for medical and disability benefits paid by Petitioner's Union Health & Welfare Fund and as accrued sick leave. Respondent appealed the Commission Decision to the Circuit Court, and Judge Robert Lopez Cepero entered his Order on August 6, 2013, instructing the Commission to discuss several issues and provide a written explanation supporting its findings and conclusions. The Commission notes that Judge Cepero did not reverse any finding or award of the Commission or Arbitrator or instruct the Commission to do so. The Commission provides the following additional explanation and discussion pursuant to the Circuit Court's Order:

Petitioner, a tank truck driver, alleged that he injured his left knee on the bumper of his tractor trailer when he fell from the trailer on May 18, 2007. He underwent arthroscopic surgery on his left knee, subsequently developing right knee pain from alleged overuse while favoring his injured left knee. Petitioner received numerous Supartz and cortisone injections and eventual arthroscopic surgery on his right knee with little relief. When Petitioner's bilateral knee complaints persisted, his surgeon recommended bilateral total knee replacements. Although Respondent had been paying Petitioner's medical expenses and temporary total disability related to both knees, it refused to authorize and pay for the recommended surgery. Instead, Respondent obtained a Section 12 evaluation from Dr. Cohen, who opined that Petitioner's bilateral knee condition had initially been causally related to his fall, but his current condition was related to his pre-existing osteoarthritis.

A hearing pursuant to Section 19(b) was held before Arbitrator Holland, who concluded that Petitioner's bilateral knee replacements were caused, at least in part, by his work accident and related arthroscopic procedures. The Arbitrator noted that Respondent's Section 12 examiner causally related Petitioner's bilateral arthroscopic surgeries and injections to his May 18, 2007 work accident and relied in part upon a "chain of events" analysis to conclude that Petitioner's bilateral knee replacements were also causally related to that occurrence. Arbitrator Holland awarded Petitioner medical expenses and disability benefits. Although Petitioner's Union Fund had conditionally paid Petitioner medical and lost time benefits, Petitioner was obligated, pursuant to a subrogation agreement, to refund any payments if his condition were found to be work-related.

Section 8(j) Credit. In the Request for Hearing, Respondent claimed Section 8(j) credit and stipulated that it had paid $55,657.25 in medical expenses through its group health insurance plan, $35,169.46 in temporary total disability benefits, and $18,886.96 in net non-occupational indemnity disability benefits. AX1. Petitioner disputed that Respondent was entitled to Section 8(j) credit for those payments, arguing that Petitioner was bound to reimburse the Fund for all payments by the mandatory subrogation agreement. Arbitrator Holland awarded Respondent credit under Section 8(j) of the Act for the Union Fund's medical and disability payments and also ordered Respondent to pay Petitioner the amount of the Fund's conditional payments. In so ruling, the Arbitrator relied upon *Wellington v. Residential Carpentry*, 06 IWCC 301, for the proposition that, although Respondent is entitled to a Section 8(j) credit for the Fund's payments, it was obligated to pay Petitioner directly the full amount of the benefits paid by the Fund, rather than merely holding Petitioner harmless from the Fund's attempts to obtain reimbursement of those payments.

Both parties appealed to the Commission from the Arbitrator's award of Section 8(j) credit to Respondent and from his order requiring Respondent to pay Petitioner directly for the medical expenses at the fee schedule rate and lost time benefits for the period paid by the Union Fund. The Commission reversed the award of Section 8(j) credit, but affirmed the Arbitrator's award to Petitioner of medical and lost time benefits.

The Commission notes that the right to credit operates as an exception to liability created under the Act and is therefore narrowly construed. The burden is on Respondent to establish its right to Section 8(j) credit.

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Arbitrator Holland noted that Petitioner was forced to sign a subrogation agreement as condition precedent for receiving medical and disability benefits from his union's Health & Welfare Fund (PX19). The Arbitrator allowed Respondent credit for these payments under Section 8(j) but ordered Respondent to pay Petitioner the amounts paid by the Health & Welfare Fund to the providers for medical expenses and to Petitioner as disability pay, "in accordance with respondent's obligation under the Act to hold petitioner harmless and petitioner's obligation to reimburse the fund." Arbitrator's Decision, p. 17.

The Illinois Supreme Court has previously addressed the applicability of Section 8(j) credit in cases where the claimant's union fund has made payments for medical expenses or disability. In *Hill Freight Lines, Inc. v. Indust. Comm'n*, 36 Ill. 2d 419, 223 N.E.2d 140 (1967), the Supreme Court rejected the employer's attempt to claim Section 8(j) credit.

> Finally, it is the employer's contention that the commission and circuit court erred in disallowing credit for the benefits received by the employee under a health and welfare program to which employer contributed. . .We need not in this opinion examine the specific provisions of section 8(j) of Workmen's Compensation Act since we do not reach the question of whether this particular union health and welfare plan is that type of plan covered by section 8(j). As we have previously indicated the insurance contract itself is not in evidence and we have but meager information by testimony as to what the plan contains. Although the burden of proving his case is upon the employee, we feel that the burden is upon the employer to establish the fact that it is entitled to credits under section 8(j) of the Workmen's Compensation Act. It was therefore incumbent upon the employer to see that sufficient evidence of the insurance contract itself was introduced in order to determine if it fell within the provisions of section 8(j). The means for the employer to do so were certainly available and since the insurance contract is not in evidence, we will not reverse the determination of the commission on that ground.

36 Ill. 2d at 424. *See also*, *Acosta v. Granite Marble World*, 7 IWCC 1480 (Respondent failed to introduce sufficient documentation establishing entitlement to Section 8(j) credit); *Anaya v. Official Heating & Cooling*, 10 IWCC 1129 (Respondent offered no evidence that they paid any or all of the premiums or to show that the plan would not have paid benefits irrespective of whether the injury were work-related).

The Commission has previously addressed the issue of whether Section 8(j) credit is available where the worker is required to sign a subrogation agreement prior to receiving benefits. In *Swanson v. Illinois Workers' Comp. Comm'n*, 05 IWCC 153, the Commission noted that it is the practice of many employers and insurers to deny claims and then settle with the claimant on a disputed basis with the provision that no part of the settlement represents medical expenses or is for future medical expense. The employer thereby shifts the responsibility to other benefit sources, frequently a union health and welfare fund or group health insurer.

> We are of the opinion that the employer credit provided in Section 8(j) does not contemplate the situation where an employee had to assume the primary obligation to reimburse the fund for benefits paid.
>
> In response to this practice, many union health and welfare funds have either refused to pay any medical or group disability benefits in disputed workers' compensation cases, leaving employees with no access to necessary medical treatment and no income while they are disabled, or have required reimbursement agreements such as that presented herein, in which the right to reimbursement is absolute, regardless of the characterization or designation of benefits in a settlement or award of the Commission. . . .
>
> The practical effect of allowing a credit to an employer, where an employee has the primary obligation to pay the amount credited, is that claimants will either honor their obligations to the welfare funds and be put in the position of pursuing further claims against their employers, in all likelihood requiring legal representation in the circuit court, to enforce the hold harmless provision of Section 8(j) in order to be made whole and receive the full benefit of their award, or they will default on their obligations and be subject to suit by the health and welfare, with all the attendant adverse effects including loss of union benefits and credit standing, and forced to obtain legal representation to implead the employers and defend such lawsuits. Such an interpretation of Section 8(j) does not serve the legislative intent, expressed in Section 16(a) of the Act, to encourage prompt administrative handling of worker's compensation claims and thereby reduce expenses to claimants for compensation under the Act, nor does it serve principles of judicial economy.

Swanson. As a result of these considerations, the Commission majority in *Swanson* refused to grant Respondent's request for Section 8(j) credit for amounts paid by Petitioner's union's health and welfare fund. Respondent was ordered to pay Petitioner the amount advanced by the union fund.

In *Lomeli v. Levy Const. Co.*, 9 IWCC 163, the Commission affirmed Arbitrator Andros's denial of Section 8(j) credit for medical expenses paid by the claimant's union's health insurance carrier, finding that the medical plan in that case was legally distinguishable from the employer provided health insurance plan for which employers may claim Section 8(j) credit. Moreover, Arbitrator Andros noted that the claimant in *Lomeli* was required to sign a subrogation agreement similar to that signed by Petitioner here. The Arbitrator noted that the claimant had the primary obligation to pay the amount credited if Section 8(j) credit were awarded. Therefore, the claimant would be required to honor his legal obligation to the Welfare Fund and then be placed in a position of having to pursue an additional claim against his employer in the court system to enforce Section 8(j)'s hold harmless provision. Arbitrator Andros concluded, and the Commission agreed, that this interpretation of Section 8(j) does not serve the intent of the legislature to facilitate the handling of Workers' Compensation claims in keeping the expenses chargeable to the ultimate party responsible under the Act.

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Similarly, in *Carpenter v. Gallaher & Speck*, 07 IWCC 466, the Commission followed the rationale in *Swanson* and denied Respondent Section 8(j) credit, based upon the existence of the subrogation agreement between Petitioner and his union fund and upon Respondent's failure to introduce any documents which established an entitlement to credit. Respondent was ordered to pay Petitioner the medical bills it had refused to pay at the time they were provided.

However, as noted by Arbitrator Holland in his decision, the Commission took a different position in *Wellington v. Residential Carpentry*, 06 IWCC 301. In *Wellington*, the Commission reversed the Arbitrator's denial of Section 8(j) credit. The Arbitrator had opined that Section 8(j) did not contemplate a situation where the employee has the primary obligation to reimburse the fund for benefits paid (following the Commission's rationale in *Swanson*). On review, the Commission reversed the Arbitrator and allowed Respondent Section 8(j) credit for the medical and disability benefits paid by the Carpenters Welfare Fund. However, the Commission ordered Respondent to pay the amount of the benefits to Petitioner "in accordance with Respondent's 8(j) obligation to hold Petitioner harmless" and Petitioner's obligation to reimburse the Fund.

Arbitrator Holland followed the *Wellington* line of reasoning in allowing Respondent credit and in ordering it to pay Petitioner the same amount as the credit awarded. This award of credit for the Union Fund payments resulted in some confusion, as both parties cited the Section 8(j) credit issue as one of the grounds for appeal to the Commission. Allowing Section 8(j) credit, while at the same time requiring Respondent to advance funds to Petitioner to cover his subrogation obligation, in effect nullifies the award of Section 8(j) credit. Under Section 8(j), Respondent would be required to hold Petitioner harmless "from any and all claims or liabilities that may be made against him by reason of having received such payments only to the extent of such credit." Under the Arbitrator's ruling and the *Wellington* rationale, Respondent would be required to pay the medical or disability benefit amount to Petitioner regardless of whether the Fund or group insurer sought reimbursement for its payments.

The Commission finds that Respondent failed to prove it was entitled to Section 8(j) credit and confirms its reversal of the Arbitrator's award of Section 8(j) credit for the union fund payments. Respondent is ordered to pay Petitioner those medical expenses previously paid by the Fund at the fee schedule rate and to pay Petitioner temporary total disability for the period during which the Fund paid disability payments.

Chain of events. Arbitrator Holland relied in part on the "chain of events" analysis in reaching his conclusion that Petitioner's need for bilateral total knee replacements was causally connected to his work accident on May 18, 2007. The Arbitrator relied not only upon the "chain of events," but also upon Petitioner's testimony and Dr. Nikkels' medical records and causation opinion. The Commission affirmed the Arbitrator's causation finding that Petitioner's May 18, 2007 accident and the related arthroscopic procedures were at least a contributing cause in the worsening of his pre-existing osteoarthritic condition, which in turn resulted in the need for bilateral knee replacement surgery.

Respondent argued on appeal that Petitioner was not entitled to rely on the "chain of events" analysis, as he failed to prove he was in a state of good health prior to the accident. Respondent maintains that Petitioner was required to prove a state of good health followed by the

accident necessitating medical treatment and lost time. Petitioner here admittedly suffered from bilateral knee pain and had been diagnosed with arthritis prior to the accident. However, despite any chronic degenerative condition, Petitioner was able to perform his job full duty prior to his fall, whereas following the accident, his condition deteriorated so greatly that he required bilateral knee replacements. Even though Petitioner had degenerative arthritis before his accident, it is evident that his condition worsened significantly following his accident, becoming symptomatic and requiring medical treatment for the first time. If a pre-existing condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 797 N.E.2d 665 (2003); *Rock Road Const. Co. v. Industrial Comm'n*, 37 Ill. 2d 123, 227 N.E.2d 65 (1967). This exacerbation of an ongoing degenerative condition constitutes circumstantial evidence sufficient to prove a causal connection between Petitioner's bilateral knee condition and his work accident.

The "chain of events" analysis is primarily relied upon when other evidence of causal connection is not available. In this case, Petitioner's medical records and Dr. Nikkels' causation opinion support his position that the fall exacerbated his arthritis causing it to become symptomatic, to require arthroscopic repair of his menisci, and, after physical therapy, Supartz and steroid injections, eventually to require bilateral knee replacements. Dr. Nikkels testified at deposition that Petitioner required total knee replacements as a result of the work accident, and even Respondent's expert, Dr. Cohen, agreed that Petitioner's need for bilateral arthroscopic surgery and Supartz and steroid injections was causally related to his accident. Only when it became apparent that Petitioner would require more complex and expensive surgery to cure his work injury did Dr. Cohen find that the proposed surgery was not causally related to Petitioner's work accident. Arbitrator Holland found that the causation chain continued past the arthroscopic surgeries and injections and included the recommended bilateral total knee replacements. The Commission affirmed and now re-affirms that position.

Respondent argued that Petitioner's pre-existing degenerative arthritis progressed independently of his work accident and his related arthroscopic surgeries to cause his need for total knee replacements. According to Respondent's §12 examiner, this natural progression, together with Petitioner's obesity, caused the need for replacements. Arbitrator Holland found this theory untenable and accepted instead Dr. Nikkels' more persuasive causation opinion that the accident and related arthroscopic surgeries were at least contributing factors in Petitioner's need for knee replacements. Although the "chain of events" analysis is sufficient to support a finding of causation, in this case the treating surgeon's opinion supported that analysis. *Shafer v. IWCC*, 2011 IL App. (4th) 100505WC, 976 N.E.2d 1, 364 Ill. Dec. 1.

Penalties and Fees. Arbitrator Holland found Respondent's refusal to pay medical expenses and temporary total disability benefits from April 18, 2011 (the date of Petitioner's bilateral total knee replacement surgery) through November 30, 2011 (the date of hearing) to be unreasonable and vexatious, as was Respondent's reliance on Dr. Cohen's incredible causation opinion, in which he found all of Petitioner's treatments up to the knee replacement surgery to be causally related to his work-related injury. However, when Dr. Nikkels found that there were no other conservative measures likely to improve Petitioner's condition and recommended total knee replacements, Dr. Cohen drew the line, finding that any treatment beyond that point was not work-related.

Employers are entitled to rely upon their medical experts' causation and treatment opinions, but only so long as those opinions are reasonable. Under these facts, it should have been clear to Respondent that if all of the treatment administered to Petitioner's knees prior to April 18, 2011 was causally related to his accident, the surgery proposed by his treating surgeon would also be causally related, despite Dr. Cohen's opinion. So found Arbitrator Holland and the Commission.

The Circuit Court has requested an explanation of the calculation of Section 19(k) and (l) penalties and Section 16 fees. Arbitrator Holland based his award of penalties and fees on Respondent's non-payment of temporary total disability from the date of Petitioner's knee replacement surgery through the date of hearing. The Arbitrator elected not to include in his calculation of penalties and fees the medical expenses related to Petitioner's total knee replacement surgery. This decision was subject to the Arbitrator's discretion. Although he found Respondent's termination of benefits vexatious and unreasonable, the Arbitrator elected to impose penalties only for the non-payment of temporary total disability and not for the non-payment of medical benefits. However, Arbitrator Holland offered no explanation for imposing penalties and fees only on the non-payment of temporary total disability.

The Commission notes that Petitioner testified that the parties had reached a verbal agreement prior to hearing during an informal conference with the Arbitrator in Rock Falls, Illinois. The agreement allegedly provided that Petitioner would proceed with his bilateral knee surgeries under his group health policy in exchange for Respondent's two payments of $15,000.00 each, representing advances against permanency. Petitioner underwent bilateral knee replacements on April 18, 2011, utilizing group health coverage for medical expenses, and in June 2011, Respondent made one payment of $13,015.67, representing a 10% loss of use of one leg. According to Petitioner's testimony at hearing, Respondent failed to make any additional payments pursuant to the verbal agreement. Respondent offered no evidence regarding the alleged agreement.

The Commission will not hypothesize regarding the basis for the Arbitrator's decision not to award penalties and fees for the medical expenses awarded in this case. However, the Commission notes that no evidence of the fee schedule amount for the disputed medical expenses was presented by either party. Petitioner was able to obtain appropriate medical treatment in the form of bilateral total knee replacements, paid for by Petitioner's group health insurer. Respondent has been ordered to pay Petitioner the fee schedule amount of all medical expenses despite group health's payment of those expenses. The Commission finds that the award of penalties and fees on the unpaid temporary total disability from April 18, 2011 through November 30, 2011, $24,882.94, constitutes a sufficient penalty for Respondent's denial of medical and lost time benefits for that period. The Arbitrator awarded Petitioner $12,441.30 in Section 19(k), $6,810.00 in Section 19(l) (227 days at $30.00 per day), and $2,488.26 in Section 16 attorney fees. The Commission affirms the award of penalties and fees.

All else is affirmed and adopted.

14IWCC0368

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $763.95 per week for a period of 98-5/7 weeks, that being the period of temporary total incapacity for work under Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay any reasonable, necessary, and related medical bills pursuant to the medical fee schedule, in accordance with and subject to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner penalties in the amount of $12,441.30, pursuant to Section 19(k) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner penalties in the amount of $6,810.00, pursuant to Section 19(l) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $2,488.26 in Section 16 attorney fees.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injuries.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under Section 19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 16 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-03/19/14
drd/dak
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STATE OF ILLINOIS)
) SS.
COUNTY OF ROCK ISLAND)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse Accident	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CHRISTIE YOUNG,

Petitioner,

vs. NO: 12 WC 28874

KVF QUAD CORPORATION,

14IWCC0369

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability, and "Prospective med." and being advised of the facts and law, reverses the Decision of the Arbitrator on the issue of accident but attaches the Decision of the Arbitrator for the findings of fact, which is made a part hereof, with the modifications and additions outlined below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission finds that Petitioner did sustain accidental injuries arising out of and in the course of her employment on June 20, 2012. The Arbitrator found the facts in this case to be similar to Reeves v SC2/Superior Consolidated, 12 IWCC 1328 (12/5/12), in which the claimant was denied benefits where the shoe lace of one boot became entangled in the speed lace hook of the other boot causing a fall and the Commission found that this was a personal risk not incidental to employment. However, Reeves is easily distinguishable from the case at bar. In Reeves, the petitioner's own personal boots, which he wore outside of work, also had a similar speed lacing system and he was actually wearing similar boots at the time of hearing. This made his choice of boots a risk personal to him. In contrast, Petitioner in the case at bar testified that she never wore these kinds of boots outside of work and does not have any personal boots similar to those. Outside of work, she normally wore tennis shoes. (T.11-12).

Based on the above, the Commission finds that, even though Petitioner chose the specific type of work boot she was wearing on the date of injury, she was nevertheless required to wear steel-toed boots with metatarsal supports that she would not have been wearing "but for" her employment with Respondent. As such, we find that she was exposed to a greater risk than the general public and her injury arose out of and in the course of her employment.

Having found that Petitioner has proven a compensable accident, the Commission awards Petitioner's reasonable, necessary, and related medical bills of $2,263.32 represented in Px7 through Px11 subject to the fee schedule in §8.2 of the Act. Petitioner is also entitled to prospective left shoulder surgery as prescribed by Dr. Wynn. The Commission notes that no lost time from work has been claimed by Petitioner.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $2,263.32 for medical expenses under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for prospective left shoulder surgery as recommended by Dr. Wynn under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $2,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 28 2014

Charles J. DeVriendt

Ruth W. White

Daniel R. Donohoo

SE/
O: 3/26/14
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

YOUNG, CHRISTIE
Employee/Petitioner

Case# **12WC028874**

KVF QUAD CORPORATION
Employer/Respondent

14IWCC0369

On 4/18/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0347 MARSZALEK AND MARSZALEK
STEVENA GLOBIS
221 N LASALLE ST SUITE 400
CHICAGO, IL 60601

0358 QUINN JOHNSTON HENDERSON ETAL
JOHN KAMIN
227 N E JEFFERSON ST
PEORIA, IL 61602

14IWCC0369

STATE OF ILLINOIS)
)SS.
COUNTY OF ROCK ISLAND)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

CHRISTIE YOUNG ,
Employee/Petitioner

v.

KVF QUAD CORPORATION ,
Employer/Respondent

Case # 12 WC 28874

Consolidated cases: NONE .

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Bloomington**, on **January 17, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other: _____

FINDINGS

On the date of accident, **June 20, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did not* sustain an accident that arose out of and in the course of employment.

Timely notice of this alleged accident *was* given to Respondent.

Petitioner's current condition of ill-being *is not* causally related to the alleged accident.

In the year preceding the alleged injury, Petitioner earned **$26,619.00**; the average weekly wage was **$531.14**.

On the date of the alleged accident, Petitioner was **55** years of age, ***single*** with **one** dependent child.

Petitioner ***has in part*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$ 0.00** for TTD, **$ 0.00** for TPD, **$ 0.00** for maintenance, and **$ 0.00** for other benefits, for a total credit of **$ 0.00**.

Respondent is entitled to a credit of **$ 0.00** under Section 8(j) of the Act for medical benefits.

ORDER

The Arbitrator finds that Petitioner failed to prove that she sustained an accidental injury that arose out of and in the course of her employment by Respondent on **June 20, 2012.**

The Arbitrator further finds that the condition of ill-being complained of is not causally related to the alleged accidental injury of **June 20, 2012.**

All claims for compensation made by Petitioner in this matter are thus hereby denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator JOANN M. FRATIANNI

April 15, 2013
Date

ICArbDec19(b)

APR 18 2013

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

F. Is the Petitioner's present condition of ill-being causally related to the injury?

Petitioner testified that she works for Respondent in the shipping and receiving department. As part of her job duties, she was required to access trucks that made deliveries, check in parts, enter part numbers into the computer and tag parts. This job required some lifting up to fifty (50) pounds. Petitioner testified that she was required to wear ankle height steel toe boots with a metatarsal guard. These books contained speed laces with hooks at the top of the shoe. (Px2) Introduced into evidence was the company requirement that such boots be worn by Petitioner on this job and she would be reimbursed $100.00 for each pair purchased for the job by Respondent. (Px1) Respondent chose the type of safety boots worn and identified three (3) stores where they could be purchased. Petitioner purchased her boots at one of those stores at a cost of $185.00.

Petitioner testified that on June 20, 2012, it was warm outside and she was wearing knee shorts. Petitioner introduced evidence that it was as high as 91 degrees on that date. Petitioner testified that her legs felt weak and she went inside for a drink of water. As she turned to open the door of a small refrigerator, the lace of one of her boots caught in the speed hook of the other boot, causing her to fall to th ground on her left arm and shulder.

Respondent disputes that this episode represents an accidental injury that arose out of and in the course of Petitioner's employment on that date.

Mr. Michael Crotty testified in this matter that he was the President of Respondent. Mr. Crotty testified that he did not dispute that the shoelaces became entangled and confirmed that while employees are required to wear steel toe boots with metatarsal guards, Respondent simply approves the footware. (Px1) Mr. Crotty testified that while stores in the area were identified for employees to purchase work boots and shoes, employees were not required to use those stores and could purchase approved shoes elsewhere.

The Arbitrator notes that the facts in this claim are very similar to *Reeves v. SC2/Superior Consolidated,* 12 IWCC 1328. In *Reeves,* the shoe lace of one boot became entangled in the speed lace hook of the other boot, causing a fall. The Commission noted that the claimant had chosen the steel toe boots to wear and they were not company issued. The Commission found that tripping over laces entangled in a speed lace hook was a personal risk not incidental to employment and denied the claim.

Based upon the above, the Arbitrator finds that Petitioner failed to prove that she sustained an accidental injury that arose out of and in the course of her employment with Respondent on June 20, 2012.

Based further upon said findings, the Arbitrator further finds that Petitioner failed to prove that the condition of ill-being alleged was caused by an injury at work for Respondent.

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

See findings of this Arbitrator in "C" and "F" above.

Based upon said findings, all claims made by Petitioner for medical expenses in this matter are hereby denied.

K. Is Petitioner entitled to any prospective medical care?

See findings of this Arbitrator in "C" and "F" above.

Based upon said findings, the Arbitrator further finds that all claims made by Petitioner for certain prospective medical care and treatment for this alleged injury are hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Yenifer Deblas,
Petitioner,
vs.

NO: 12 WC 28078

Wal-Mart Stores Inc.,
Respondent,

14IWCC0370

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, notice and medical expenses incurred and prospective and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms and adopts the decision of the Arbitrator but deletes the second to last paragraph in Section C of her decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 5, 2013, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 20 2014
o031914
CJD/hf
049

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

DEBLAS, YENNIFER
Employee/Petitioner

Case# **12WC028078**

14IWCC0370

WAL-MART STORES INC
Employer/Respondent

On 4/5/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

4037 LAW OFFICES OF CHRISTINE M ORY PC
511 W WESLEY ST
WHEATON, IL 60187

5074 QUINTAIROS PRIETO WOOD & BOYER PA
MICHAEL J SCULLY
180 N STETSON AVE SUITE 4525
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF DUPAGE)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

YENNIFER DEBLAS ,
Employee/Petitioner

v.

WALMART STORES, INC. ,
Employer/Respondent

Case # 12 WC 28078

Consolidated cases: NONE .

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Chicago**, on **December 14, 2012.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other: _____

FINDINGS

On the date of accident, **December 26, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did not* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was not* given to Respondent.

Petitioner's current condition of ill-being *is not* causally related to the accident.

In the year preceding the alleged injury, Petitioner earned **$28,932.80**; the average weekly wage was **$556.40**.

On the date of accident, Petitioner was **25** years of age, ***married*** with **two** dependent children.

Petitioner *has in part* received all reasonable and necessary medical services.

Respondent *has not* paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$ 0.00** for TTD, **$ 0.00** for TPD, **$ 0.00** for maintenance, and **$ 0.00** for other benefits, for a total credit of **$ 0.00**.

Respondent is entitled to a credit of **$14,020.45** under Section 8(j) of the Act for medical benefits.

ORDER

The Arbitrator finds that Petitioner failed to prove that she sustained an accidental injury that arose out of and in the course of her employment by Respondent on **December 26, 2011.**

The Arbitrator further finds that Petitioner failed to prove that she gave Respondent timely notice of this alleged accidental injury as required by the Act.

The Arbitrator further finds that the condition of ill-being complained of is not causally related to the alleged accidental injury of **December 26, 2011.**

All claims for compensation made by Petitioner in this matter are thus hereby denied.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator JOANN M. FRATIANNI

April 1, 2013
Date

ICArbDec19(b)

APR 5- 2013

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

Petitioner testified that she works for Respondent as a zone manager in the consumerables department. As part of her job duties, she supervises other employees. Petitioner testified that she reported to work on December 25, 2011 at 9:00 PM. Her duties that day were to condense Christmas decorations and set up for New Years. She began her shift by moving cosmetic products to flag and price them. After lunch, that ended at 1:45 AM, she worked with Mr. Ken Vandeventer to set up New Years celebrations in the store. Petitioner was Mr. Vandeventer's supervisor at that time.

Mr. Vandeventer testified he worked with Petitioner that evening setting up champagne for the early morning hours of December 26, 2011. He helped Petitioner for 10-20 minutes, and then moved to another area of the store during his shift.

Petitioner testified that following Mr. Vandeventer's departure, she continued stacking bottles of champagne alone. When she got to the second section of champagne, she experienced a "pull" in her back, but continued working.

Petitioner testified that she told a coworker named "Rup" that her back started to hurt. Petitioner testified that "Rup" called Mr. Paul Grice to send her some help.

Mr. Grice testified that he was the shift manager that evening. Mr. Grice testified that Mr. Vandeventer was written up for several infractions and quit without providing two weeks notice in April of 2012. He was later caught in a storeroom after quitting going through boxes looking for collectible "Hot Wheels" cars.

Mr. Grice testified that he was working the same shift with Petitioner on December 25-26, 2011. Mr. Grice testified that Petitioner told him her back was bothering her but never said that she injured it at work and continued working her shift. Mr. Grice testified that he helped Petitioner for a period of time and then left to work elsewhere in the store. Mr. Grice testified that Petitioner did not file any paperwork that evening indicating a workers' compensation injury.

Mr. Brian Snyderworth testified that he was a shift manager on that evening. At that time he was setting up an end cap of lotion and asked Petitioner if she could help him, as he was suffering from pain in both knees and ankles and could not reach to the bottom shelving to fill them. Petitioner told him her back hurt and she could not reach the top shelf, but could reach the bottom ones. Mr. Snyderworth testified that Petitioner did not inform him that she had suffered a work injury to her back. Mr. Snyderworth testified that if Petitioner had so informed him, he would have immediately arranged for another manager or himself to complete the proper paperwork.

Petitioner following that date first sought medical treatment on May 14, 2012 with Dr. Singh, an orthopedic surgeon. Dr. Singh prescribed an MRI and referred her to a pain clinic. Dr. Singh was of the opinion that the injury was probably work related, based upon the history of injury received from her. (Rx3)

On May 15, 2012, Petitioner filed for a Family Medical Leave of absence. On the application form, she checked off a box that read "own serious health condition" and not boxes that read "workers compensation," "pregnancy" and "disability."

Petitioner returned to see Dr. Singh on May 16, 2012, who informed her of her MRI results. Petitioner last saw Dr. Singh on June 25, 2012, who felt that she should see a pain specialist and receive steroid injections. Petitioner later received two such injections to her back.

On August 3, 2012, Petitioner sent a letter to Respondent describing her work injury. On August 15, 2012, Petitioner filed the Application for Adjustment of Claim that is the subject matter of this case. Prior to that date, all medical expenses incurred were paid through her group health insurance received from Respondent. Petitioner testified that she was unaware of Respondent's policies about reporting injuries and the methods of reporting. Petitioner worked for Respondent for six years.

Mr. Grice testified that all employees are made aware that even if the slightest injury occurs at work they are required to notify a supervisor and complete an accident report. Mr. Grice reported that Petitioner had complaints of back pain prior to December 26, 2011 that were reported to her supervisor.

Prior to this claim for injury, Petitioner was involved in an automobile accident in February of 2011, in which the airbags in the car she was driving deployed. Petitioner testified that she injured her chest and foot and experienced no neck pain at the time. Medical records received from American Family Insurance for the car accident reflect complaints of pain and treatment for a neck condition as well as the chest and foot.

Based upon the above, the Arbitrator finds that Petitioner failed to prove that she sustained an accidental injury that arose out of and in the course of her employment with Respondent on December 26, 2011. This finding is based on the lack of corroborating evidence from other employees and medical providers.

E. Was timely notice of the accident given to Respondent?

See findings of this Arbitrator in "C" above.

Based upon said findings, the Arbitrator further finds that timely notice of this accident was not provided to Respondent within the 45 day period prescribed by statute. It would appear that notice was actually given in this matter on August 3 2012.

F. Is the Petitioner's present condition of ill-being causally related to the injury?

See findings of this Arbitrator in "C" above.

Based upon said findings, the Arbitrator further finds that Petitioner failed to prove that the condition of ill-being alleged was caused by an injury at work for Respondent.

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

See findings of this Arbitrator in "C" above.

Based upon said findings, all claims made by Petitioner for medical expenses in this matter are hereby denied.

K. Is Petitioner entitled to any prospective medical care?

See findings of this Arbitrator in "C" above.

Based upon said findings, the Arbitrator further finds that all claims made by Petitioner for certain prospective medical care and treatment for this alleged injury are hereby denied.

N. Is Respondent due any credit?

See findings of this Arbitrator in "C" above.

As no awards of compensation or medical expenses are being made in this matter, all claims made by Respondent for credit are hereby denied.